Supreme Court, U.S.
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No. 06-147

IN THE

Supreme Court of the United States

AT HOME CORPORATION,
Petitioner,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENT, INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 27, 2006

QUESTIONS PRESENTED

1. In a case involving one of the largest insider profits ever realized (over $600 million), where the complaint properly alleges a matching "sale" and "purchase" of securities within a six-month period, may statutory insiders escape liability under § 16(b) of the Securities Exchange Act of 1934 because of a judicial interpretation that establishes the date of creation of a so-called hybrid derivative instrument as the only "sale" date, thereby opening a large loophole for speculative abuse of the precise type § 16(b) was intended to prevent?

2. Does a "purchase" of securities for purposes of § 16(b) of the Securities Exchange Act of 1934 occur when a statutory insider of an issuer acquires securities of the issuer through its acquisition of another company which, in turn, owns securities of the issuer given the plain language of § 3(a)(13) of the Exchange Act, which expressly defines "purchase" to include "any contract to buy, purchase or *otherwise acquire*" a security, 15 U.S.C. § 78c(a)(13) (emphasis added)?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were (a) plaintiff-appellee At Home Corporation, and (b) defendants-appellants Cox Communications, Inc., Cox@Home, Inc., Comcast Corporation, Comcast Online Communication, Inc., Comcast PC Investments, Inc., Brian L. Roberts and David M. Woodrow.

At Home Corporation certifies that it is not a publicly held corporation and that there is no publicly held company owning 10% or more of its stock.

TABLE OF CONTENTS

PAGE

Questions Presented i

Parties to the Proceedings Below and Corporate Disclosure Statement ii

Table of Authorities v

Petition for a Writ of Certiorari 1

Opinions and Orders Below 2

Jurisdiction 2

Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 8

I. This Case Raises Important And Unsettled Questions Under The Federal Statute Prohibiting Insider, Short-Swing Trading Profits And Addresses One Of The Largest Insider Profits Ever Recorded 8

A. Count One 9

B. Count Two 12

Conclusion 16

Appendix

Second Circuit Opinion (April 28, 2006) 1a

Second Circuit Errata Sheet (June 6, 2006) 14a

Second Circuit Judgment (April 28, 2006) 15a

District Court Amended Opinion (August 17, 2004) 17a

District Court Amended Judgment (December 8, 2004) 31a

15 U.S.C. § 78c(a)(13) 32a

15 U.S.C. § 78p(b) 32a

TABLE OF CONTENTS—CONTINUED

PAGE

17 C.F.R. § 240.16a-1(c)(6) 33a

17 C.F.R. § 240.16a-1(h) 34a

17 C.F.R. § 240.16b-6(a) 34a

Complaint and Demand for Jury Trial (September 24, 2002) 35a

March 28, 2000 Letter Agreement and Annex A Thereto (March 28, 2000) 63a

TABLE OF AUTHORITIES

CASES **PAGE**

At Home Corp. v. Cox Commc'ns, Inc., 340 F. Supp. 2d 404 (S.D.N.Y. 2004) 2

At Home Corp. v. Cox Commc'ns, Inc., 446 F.3d 403 (2d Cir. 2006) 2

Bass v. Janney Montgomery Scott, Inc., 210 F.3d 577 (6th Cir. 2000) 14

Cascade Energy & Metals Corp. v. Banks, 896 F.2d 1557 (10th Cir. 1990) 14

Gollust v. Mendell, 501 U.S. 115 (1991) 2, 8

Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) 15

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985) 13

Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418 (1972) 8, 15

Reves v. Ernst & Young, 494 U.S. 56 (1990) 13, 14

SEC v. W.J. Howey Co., 328 U.S. 293 (1946) 13

Smith v. Arthur Andersen LLP, 421 F.3d 989 (9th Cir. 2005) 14

STATUTES, REGULATIONS, AND RULES

17 C.F.R. § 240.16a-1 ..... 3, 4, 9

17 C.F.R. § 240.16b-6 ..... 3, 4, 9

15 U.S.C. § 78c(a)(13) 3, 7, 12

15 U.S.C. § 78p(b) 3, 8, 9, 15

28 U.S.C. § 1254 2

FED. R. CIV. P. 12(b)(6) 7

SUP. CT. R. 10(c) 2

TABLE OF AUTHORITIES—CONTINUED

OTHER AUTHORITIES **PAGE**

Ownership Reports and Trading by Officers, Directors and Principal Security Holders, Exchange Act Release No. 28869, 1991 WL 292000, Fed. Sec. L. Rep. (CCH) ¶ 84,709 (Feb. 8, 1991)..... 9-10

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PETITION FOR A WRIT OF CERTIORARI

In this era of outsized corporate benefits to insiders, § 16(b) of the Exchange Act, passed over 70 years ago as part of a sweeping reform of our securities markets, must continue to play a large role in restraining insiders from profiting at the expense of the corporation. The Second Circuit's decision, however, has created new tests based on hindsight and the subjective intent of the parties that have no basis in the statute itself and conflict with the statute's primary purpose. This new approach badly damages the enforceability of § 16(b) and creates loopholes that invite abusive speculation by corporate insiders to the detriment of corporations and their shareholders.

In affirming the dismissal of a claim seeking to recover one of the largest insider profits ever recorded, an admitted profit of over $600 million by two of the largest cable companies in the United States, the Second Circuit transformed a "strict liability" statute into a "no liability" statute. It erroneously concluded that corporate insiders could create agreements to sell securities at a future date at an unknown price and yet have the § 16(b) clock begin ticking immediately—thus avoiding all § 16(b) liability when those shares were actually sold. The Second Circuit also refused to apply the plain language of the statutory definition of one of the most critical terms in the federal securities laws—"purchase," and, instead, judicially legislated a new definition.

It has been over 15 years since the Court last addressed § 16(b).[1] The Court should grant the petition for writ of certiorari to resolve important unsettled questions of federal law involving the application of § 16(b) and to close dramatically expandable loopholes created by the Second Circuit's decision. *See* SUP. CT. R. 10(c). The Court should grant certiorari to make clear that courts must avoid judicial legislation concerning the securities laws.

OPINIONS AND ORDERS BELOW

The Second Circuit's opinion, App. 1a, is reported at *At Home Corp. v. Cox Communications, Inc.*, 446 F.3d 403 (2d Cir. 2006). The District Court's opinion, App. 17a, is reported at *At Home Corp. v. Cox Communications, Inc.*, 340 F. Supp. 2d 404 (S.D.N.Y. 2004).

JURISDICTION

The Second Circuit issued its judgment and opinion on April 28, 2005. The Court has jurisdiction under 28 U.S.C. § 1254.

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[1] *See Gollust v. Mendell*, 501 U.S. 115 (1991).

STATUTORY PROVISIONS INVOLVED

Section 16(b) of the Exchange Act provides:

> "For the purpose of preventing the unfair use of information which may have been obtained by [a statutory insider (*e.g.*, a person or group owning 10% or more of the company's stock or a director or officer of the company)] by reasons of his relationship to the issuer, any profit realized [by an insider] from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such [insider] in entering into such transaction . . . ." 15 U.S.C. § 78p(b).

Section 3(a)(13) of the Exchange Act defines "purchase" as including "any contract to buy, purchase or *otherwise acquire*" a security. 15 U.S.C. § 78c(a)(13) (emphasis added).

In 1991, the Securities and Exchange Commission enacted rules concerning § 16(b)'s applicability to derivative securities such as the Put instrument at issue here. The relevant rules are set forth below and included in the appendix in their entirety:

- Rule 16a-1(c) defines "derivative securities" as "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security." 17 C.F.R. § 240.16a-1(c).
- Rule 16a-1(c)(6) *excludes* from its definition of a derivative security a security "with an exercise or conversion privilege at a price *that is not fixed.*" 17 C.F.R. § 240.16a-1(c)(6) (emphasis added).
- Rule 16b-6(a) provides that the establishment of a "put equivalent position" is "deemed a sale" for purposes of § 16(b). 17 C.F.R. § 240.16b-6(a).

- Rule 16a-1(h) defines a "put equivalent position" as "a *derivative security* position that increases in value as the value of the underlying equity decreases." 17 C.F.R. § 240.16a-1(h) (emphasis added).
- Rule 16b-6(b) provides that the "closing of a derivative security position as a result of its exercise or conversion" is exempt from § 16(b) and does not constitute a separate § 16(b) event. 17 C.F.R. § 240.16b-6(b).

STATEMENT OF THE CASE

At Home Corporation was formed by cable companies and a venture-capital firm in the mid-1990s as a joint venture to develop the first nationwide high-speed Internet service delivered over cable infrastructure. App. at 41a-42a. At Home scored a significant technological and marketplace success. By the fall of 2001, over 4 million cable company subscribers connected to the Internet via the At Home network. *Id.* at 43a. At Home "went public," selling billions of dollars of its common stock to public investors. *Id.* at 44a. Despite public ownership of its stock, At Home continued to be controlled by three cable companies: AT&T Corp. and defendants Cox Communications, Inc. and Comcast Corporation. *Id.* at 45a.

At Home filed for bankruptcy in September 2001. App. at 43a. At Home's causes of action against its former controlling stockholders were assigned by order of the Bankruptcy Court to a Trustee.

This case addresses a seminal corporate event in the life of At Home: the sale of corporate control by Cox and Comcast to AT&T in a series of complex transactions in March 2000 which resulted in AT&T obtaining sole control over the At Home Board of Directors and an admitted profit of more than $600 million for Cox and Comcast. App. at 37a, 54a. It is

that profit At Home seeks to recapture pursuant to § 16(b) for the benefit of its creditors and former shareholders.

The Complaint alleges that Cox and Comcast agreed in March 2000 to "put" (sell) all of their At Home stock (approximately 60 million shares) to AT&T for a total of $2,897,653,440 pursuant to a written term sheet (the "Put"). App. at 49a-50a.[2] Although hardly a model of clarity, the Put provided that the actual number of shares to be sold *and* the price per share to be paid would not be set until 15 days after notice by Cox/Comcast of their intent to put their At Home shares and that the shares could not be put (sold) to AT&T until after January 2001—more than ten months after creation of the Put. *Id.* Specifically, the Put provided that "[t]he per share purchase price under the Put will be the greater of (1) $48 and (2) the average per share trading price of the [At Home stock] during the 30 consecutive trading day period beginning 15 days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of the Put." App. at 73a; *see also* App. at 49a-50a.

Thus, if the price of At Home stock increased, the number of shares subject to the Put decreased but AT&T never paid more than the "Maximum Number" of $2,897,653,440 in consideration. App. at 72a; *see also* App. at 49a-50a. Of critical importance for analysis under § 16(b) and the applicable SEC rules, neither Cox nor Comcast knew in March 2000 how many At Home shares would ultimately be sold or at what price per share—a critical fact alleged in the Complaint and rejected by both the District Court and the Second Circuit in their application of an impermissible hindsight test. App. at 49a-50a, 53a.

On January 11, 2001, Cox and Comcast each notified AT&T that they intended to put their At Home shares in accordance with the pricing formula set forth in the under-

[2] This term sheet is included in the Appendix at 72a.

lying Put Term Sheet—and *not* at a fixed $48 per share purchase price and not for a fixed number of shares. App. at 52a. After these notices were presented to AT&T, the 30-day period for fixing the price and number of shares—*i.e.*, 15 trading days before and after the date of the notice—ran out on February 2, 2001. *Id.* at 53a, 58a. At Home alleges that a "put equivalent position" was established on that date under SEC rules, which is the equivalent of a sale for § 16(b) purposes. *Id.* at 58a. At the time of this sale, Cox and Comcast continued to own as a "group" more than 10% of At Home's securities and, therefore, were statutory insiders under § 16(b). *Id.* They also continued to be two of At Home's largest cable company customers with access to inside information of At Home. *Id.* at 37a-38a.

On May 18, 2001, apparently for "tax purposes," Cox and Comcast each entered into new (and virtually identical) agreements with AT&T under which the parties: (1) cancelled the Put, (2) Cox and Comcast kept—not sold—their approximately 60 million underlying shares of At Home common stock (on May 18, 2001, worth approximately $237 million), and (3) Cox and Comcast received 155.3 million shares of AT&T common stock, worth approximately $3.43 billion at the time. App. at 53a. The elimination of the put equivalent position constituted a "purchase" under § 16(b) at a time when Cox and Comcast continued to be statutory insiders. *Id.* at 58a.

The first count of the Complaint "matches" the § 16(b) sale on February 11, 2001 with the subsequent § 16(b) purchase approximately three months later in May 2001 when the "put equivalent position" was eliminated by virtue of the new Cox/Comcast/AT&T agreement. App. at 57a-59a. Comcast recorded and announced a pre-tax gain of $296.3 million on these transactions involving the Put, and Cox recorded and announced a pre-tax gain of $307.4 million. *Id.* at 54a. At Home seeks disgorgement of this profit under § 16(b). Any

recovery would be distributed under At Home's plan of liquidation to creditors first and then to former shareholders of At Home.

The second count pleads an alternative § 16(b) claim against Comcast alone. App. at 59a. Count two assumes that the § 16(b) sale with respect to the Put occurred, as Cox and Comcast contend, when the Put Term Sheet was first created in March 2000 and not when the number of shares and price per share were fixed 11 months later in February 2001. *Id.* The Complaint "matches" this sale with Comcast's unquestioned acquisition of At Home common stock within six months. Specifically, Comcast purchased cable companies whose assets (worth potentially as much as approximately $243 million according to the record below) included warrants to purchase 8.9 million shares of At Home common stock. *Id.*; *see also id.* at 29a. Count two seeks disgorgement of the profit earned on this matching sale and purchase within a six-month period by a statutory insider. *Id.* at 59a.

After requesting and receiving an *amicus curiae* brief from the SEC, the Second Circuit affirmed the District Court's dismissal of At Home's two § 16(b) claims pursuant to Federal Rule of Civil Procedure 12(b)(6). App. at 3a. With respect to count one, the Second Circuit, like the District Court, erroneously determined that the Put contained a "fixed" $48 price per share so that the sale for § 16(b) purposes occurred only in March 2000—more than six months before the purchase in May 2001 when the Put was eliminated. *Id.* at 8a-9a. It accordingly concluded that At Home had not alleged a "matching" purchase and sale within the required six-month period. *Id.*

Refusing to apply the Exchange Act's definition of "purchase," which includes "any contract to buy, purchase or *otherwise acquire*" a security, 15 U.S.C. § 78c(a)(13) (emphasis added), the Second Circuit also affirmed the District Court's dismissal of count two, concluding that Comcast did

not "purchase" At Home securities when it acquired them as part of its acquisition of the assets of other cable companies. App. at 11a-13a. The Second Circuit impermissibly crafted a new judicial definition of "purchase," holding "that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks and opportunities independent of the risk and opportunities that inhere in the stock of the issuer." *Id.* at 12a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS UNDER THE FEDERAL STATUTE PROHIBITING INSIDER, SHORT-SWING TRADING PROFITS AND ADDRESSES ONE OF THE LARGEST INSIDER PROFITS EVER RECORDED.

The paramount goal of § 16(b), as set forth in the text of the statute itself, is to prevent statutory insiders—officers, directors or shareholders owning more than 10% of a company's outstanding stock—from profiting based on their access to inside information. *See* 15 U.S.C. § 78p(b). To further this statutory purpose, which is as relevant today, if not more so, than in 1934 when Congress enacted the Exchange Act, the statute provides for strict liability; it does not require proof of misuse of inside information or bad faith on the insiders' part. *See id.* Section 16(b) is "a flat rule" that is "sweeping" in its coverage. *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972).

Because § 16(b) is a strict liability statute, the Court has applied "a literal, 'mechanical' application of the statutory text in determining who may be subject to liability." *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Simply put, "*any* profit realized [by an insider] from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall

inure to and be recoverable by the issuer . . . ." 15 U.S.C. § 78p(b) (emphasis added). And the statute expressly provides for enforcement in private suits such as this one. *Id.*

A. Count One

Both the District Court and Second Circuit assumed for purposes of analyzing the Complaint that: (1) Cox/Comcast constituted a statutory insider because they owned more than 10% of At Home's stock as a "group," and (2) a purchase under § 16(b) occurred when AT&T, Cox, and Comcast eliminated the Put in May 2001.

The driving issue was *when* the matching "sale" occurred for § 16(b) purposes: (i) on March 28, 2000 when the Put was created as the District Court and Second Circuit found, (ii) on February 2, 2001, when the price per share and number of shares subject to the Put were set for the first time as alleged in the Complaint, or (iii) on *both* dates as At Home argued to the Second Circuit.

The operative SEC rules provide that a security with an exercise price that is set by reference to a *future* market price (a so-called floating price because it moves with the market price of the underlying security) is *not* deemed a "derivative" security; the creation of such a security is *not* considered a purchase or sale under § 16(b). *See* 17 C.F.R. § 240.16a-1(c)(6). If a true "derivative" position is established with a fixed conversion exercise price, then a sale (if a "put") or a purchase (if a "call") occurs when the derivative is established and a subsequent "exercise" or "closing out" of the derivative position is not a separate § 16(b) event, *i.e.*, the closing of a put position is not a sale and the closing of a call position is not a purchase. *See* 17 C.F.R. § 240.16b-6.[3]

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[3] In articulating the rationale for treating the exercise—as opposed to the creation—of a "floating" derivative as the operative event for § 16(b) purposes, the SEC explained that "the primary potential for abuse arises at the time of exercise for a floating price derivative security because only at

The Second Circuit concluded—without meaningful analysis and in disregard of the Complaint's allegations—that the Put contained a "fixed component" setting "the exercise price at $48 per share if the options are executed while At Home is trading below $48 per share." App. at 4a. Using hindsight, the Court reasoned that because "Comcast and Cox exercised their put options at the $48 fixed price" and because "[t]he floating price mechanism did not affect the calculation of the exercise price" (*Id.* at 8a), the only § 16(b) sale occurred when the Put was first created in March 2000 and the actual setting of the number of shares to be sold (and the price) 11 months later was merely the supposed "exercise" of a derivative security and not a separate § 16(b) sale. *Id.* at 8a-9a.

This analysis ignored the risk of speculative abuse with respect to the Put—a risk which dramatically increased as Cox and Comcast approached the point when they could file a notice under the Put and when the number of shares and the price per share would be set for the first time. Marketplace realities, which the Second Circuit refused to consider, reflect that when the Put was created in March 2000 all Cox and Comcast knew was that AT&T would pay a total pot of consideration of $2,897,653,440 for the At Home stock held by Cox and Comcast and that this amount had been calculated using a $48 per share price. But no effective hedging and speculation could have been done at that time because, under the pricing formula in the Put, if At Home's stock price had continued to rise, the number of At Home shares sold by Cox

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exercise is the price fixed and, therefore, the extent of the profit opportunity defined." *Ownership Reports and Trading by Officers, Directors and Principal Security Holders,* Exchange Act Release No. 28869, 1991 WL 292000, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,709, at n.148 (Feb. 8, 1991) ("SEC Release No. 28869"). Thus, "[b]y treating the exercise of the floating price derivative security as the 'acquisition' of the underlying security, the rules mitigate the incentives for insiders to abuse their informational advantage." *Id.*

and Comcast in exchange for the same $2.9 billion pot of consideration would have dropped dramatically. Hedging and speculation do not work when a party has no idea of the number of shares to be hedged.

Consider the following example which highlights the increased potential for speculative abuse as the 10-month waiting period came to an end:

> Assume that the 10-month waiting period has just passed and At Home's stock is trading at around $48 per share, but Cox/Comcast, as insiders, know that At Home will be shortly issuing news of adverse developments to be followed by an improving environment and a release of positive news. Cox/Comcast time their "exercise" after the release of bad news when the stock drops to $24. Cox/Comcast's At Home position would then be sold out at the $48 per share "fixed" price. Cox/Comcast can then immediately buy back At Home shares at the much lower price *before* the release of good news and a stock price increase.

Many other examples could be given.[4]

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[4] Indeed, as we argued to the Second Circuit, an opportunity for speculative abuse existed *both* on March 28, 2000, when the Put instrument was created, *and* on February 2, 2001, when the price and number of shares subject to the Put instrument became fixed for the first time. Given this marketplace reality, a hypothetical sale for § 16(b) purposes of the *maximum* number of shares first occurred when the instrument was created on March 28, 2000 based on a $48 price even though the Put instrument could not be exercised for 10 months. But an *actual* sale, and a separate § 16(b) event, would occur when the price and number of shares subject to the Put instrument are first established on February 2, 2001 by virtue of the market formula in the Put instrument and not, contrary to the Complaint, by virtue of an election by Cox/Comcast to "exercise" pursuant to a "fixed component." This "dual" approach, rejected by the Second Circuit below, offers maximum protection for curbing speculative abuse and precludes future insiders from crafting similar instruments in the hopes of scrupulously evading § 16(b) liability.

In short, the Second Circuit refused to adopt a consistent non-hindsight approach for assessing complex derivative instruments under § 16(b). If allowed to stand, the ruling below opens expandable loopholes and signals that courts have abdicated their responsibility to enforce a statute which perhaps has more relevance today than at any time since its passage more than 70 years ago.

B. Count Two

The Second Circuit's decision concerning count two raises an important issue of statutory construction applicable to the key definitions of both "purchase" and "sale" in the Exchange Act. Inexplicably, the Second Circuit bypassed clear statutory language in favor of crafting its own definition of "purchase." Then applying that definition, the Second Circuit dismissed count two of the Complaint.

At Home alleges that if, as Cox and Comcast contend, a § 16(b) sale occurred only on March 28, 2000 when Cox and Comcast entered into the "put" arrangement with AT&T, this "sale" matches with Comcast's *acquisition* of At Home warrants to purchase approximately 8.9 million additional shares of At Home common stock through its purchase of three cable companies between January and August 2000. App. at 59a. The driving issue here is whether Comcast's acquisition of cable companies that owned warrants of At Home stock constitutes a § 16(b) "purchase" of At Home securities. It does.

Section 3(a)(13) of the Exchange Act defines "purchase" to include "any contract to buy, purchase *or otherwise acquire*" a security. 15 U.S.C. § 78c(a)(13) (emphasis added). The Second Circuit declined to apply the plain language of the definition of "purchase" and instead created its own definition concluding "that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks

and opportunities independent of the risk and opportunities that inhere in the stock of the issuer." App. at 12a. It even created an exception to this judicially created definition stating that "a different analysis may control if an indirect sale or purchase is nothing but a tactic to evade section 16(b), as, for example, if an insider acquires a holding company that has no appreciable assets other than shares of the issuer, or that holds a certain proportion of its assets in the stock of the issuer." *Id.* This test improperly defers to the subjective intent of the parties to the transaction and requires factual findings that are nowhere to be found in the text of the Exchange Act.

For all practical purposes, the Second Circuit declined to treat the unquestioned "acquisition" of At Home securities by Comcast as a "purchase" under the Exchange Act—even though before the transaction Comcast did not own these At Home securities and, after it purchased the other cable companies, Comcast "acquired" the At Home securities. This falls squarely under the plain language of the Exchange Act's definition of "purchase" and is what the Complaint clearly alleges. App. at 59a.

The Second Circuit's approach to interpreting the definitions in the Exchange Act is at odds with the Court's prior rulings and the approach of other Circuits; it is precisely the kind of issue the Court has taken up in order to clarify definitions within the securities laws. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 (1985) (holding that when an instrument falls plainly within the statutory definition of a security, "[t]here is no need . . . to look beyond the characteristics of the instrument to determine whether the Acts apply"); *Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) (providing test to define "any note"); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (providing test to define "investment contract").

Consistent with the Court's directives, other Circuit courts have continued to interpret definitional terms in the Exchange Act and Securities Act of 1933 based on their plain meaning, and the Second Circuit's departure from that methodology with respect to "purchase" places it at odds with other Circuits.[5] *See, e.g.*, *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1007-08 (9th Cir. 2005) (interpreting "person" as used in 15 U.S.C. § 78bb(f)(5)(D) in line with the statute's "plain language" and refusing to adopt a definition that was "inconsistent with the statute's plain language"); *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577, 586 (6th Cir. 2000) (applying plain meaning to the term "warrant" as used in the Securities Act and the Exchange Act, noting that "[t]he Securities Acts define warrants as securities no matter what the context in which they change hands and put parties on notice that the securities laws will apply to an exchange of warrants," and stating that "[a]n analysis that departs from the plain language of the statutory definition in order to give effect to the apparent underlying intentions of the parties to a transaction is an inappropriate application of judicial authority and flies in the face of the fundamental purpose for which the federal securities laws were drafted"); *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1580 nn.22-23 (10th Cir. 1990) (finding that the phrases "'fractional undivided interest in oil, gas or other mineral rights'" and "'certificate of interest or participation in any profit-sharing agreement or in any oil, gas or other mineral royalty or lease'" as used in the definition of "security" in both the Securities Act and the Exchange Act were "unambiguous" and therefore "susceptible to plain meaning").

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[5] While this Court interpreted the plain language of the statute's definitional terms with respect to the definition of "any note" to restrict its breadth, it only did so after recognizing that notes "are used in a variety of settings, not all of which involve investments." *Reves*, 494 U.S. at 62.

The Second Circuit's decision departs from this "plain meaning" approach and because the vast predominance of § 16(b) cases are filed in the Second Circuit, it sows substantial confusion under the Exchange Act. In fact, the Second Circuit's newly announced definition of "purchase," in disregard of the plain statutory definition, creates a sizeable loophole in § 16(b) enforcement. Any person or company with inside information may now acquire the stock of the issuer without regard to § 16(b) as long as the purchase is in connection with the acquisition of another company which holds the issuer's stock. Should an insider escape liability as long as its primary purpose was to acquire the other company and not the stock of the issuer held by that company? What if the insider valued the stock as part of its purchase of the target company even though acquisition of the stock was not the only motivating factor in the purchase of the company which owned the stock?

Contrary to the Second Circuit's new test, § 16(b) liability attaches whatever the motivation given its clear statutory language and the Court's prior holdings. *See* 15 U.S.C. § 78p(b); *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 424 n.4 (1972).[6] It was not the Second Circuit's prerogative to disregard the plain language of the statute.

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[6] The Second Circuit's judicially crafted definition of "purchase" creates an additional exception to § 16(b) for unorthodox transactions above and beyond that set forth by this Court in *Kern County*, which exempts transactions falling technically within the reach of § 16(b) if the insider (i) lacks access to inside information and (ii) has neither control nor voluntariness over the transaction at issue. *See Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 593-600 (1973). Here, Comcast unquestionably had both inside information of At Home at the time of the challenged transactions—the purchase of the other cable companies—and voluntarily engaged in each of them.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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July 27, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 2005

(Argued: October 17, 2005 Decided: April 28, 2006)

Docket No. 05-0115-cv

AT HOME CORPORATION,
PLAINTIFF-APPELLANT,

v.

COX COMMUNICATIONS, INC., COX @ HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,
DEFENDANTS-APPELLEES,

Before: JACOBS, CABRANES, and SACK, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Buchwald, J.) dismissing claims brought under section 16(b) of the Securities Exchange Act of 1934. Plaintiff claims that a section 16(b) sale occurs at exercise for a hybrid option containing both fixed and floating price components. In the alternative, plaintiff contends that if (in such a case) sale occurs when the option is granted, the sale should be matched with the insider's subsequent acquisition of third-party companies which in turn owned warrants to purchase the issuer's stock. We affirm.

JOSEPH S. ALLERHAND (Richard W. Slack, Etan Mark, on the brief), Weil, Gotshal & Manges LLP, New York, NY, for Plaintiff-Appellant At Home Corporation

MICHAEL D. HAYS (Michael D. Rothberg, Daniel D. Prichard, on the brief), Dow, Lohnes & Albertson, PLLC, Washington, DC, for Defendants-Appellees Cox Communications, Inc and Cox @ Home, Inc.

SHERON KORPUS, (James T. Cain, on the brief), White & Case, LLP, New York, NY, for Defendants-Appellees Comcast Corporation, Comcast Online Communication, Inc., Comcast PC Investments, Inc., and Brian L. Roberts.

DENNIS JACOBS, Circuit Judge:

This appeal raises two questions under section 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78p(b) (2005), which provides for disgorgement of short-swing profits earned by an insider who buys and sells the issuer's equity securities within six months. The questions concern the applicability of section 16(b) to [i] a hybrid transaction involving a fixed and floating price component; and [ii] a purchase of a company holding warrants in the issuer within six months of the granting of a put. The transaction that gives rise to these questions took place when American Telephone & Telegraph ("AT&T"), as holder of a large block of shares in At Home Corp., granted a put to two companies--Cox Communications and Comcast Online Communications--whose holdings in At Home were an impediment to AT&T's exercise of effective control over that company. The exercise price was the greater of $48 or the 30-day trading average of At Home shares for the 15 days before and 15 days after exercise of the put; the maximum number of shares was the number that could be bought at the exercise price for a specified (enormous) dollar amount. Within six months of the granting of the put, Comcast purchased three cable systems that held warrants for At Home stock (among other considerable assets).

In count one of the complaint, At Home as plaintiff seeks disgorgement on the theory that a section 16(b) sale occurred at exercise for these put options. The district court dismissed this claim, identifying the grant of the hybrid option as the relevant section 16(b) event, At Home Corp. v. Cox. Commc'ns, Inc., 340 F. Supp 2d 404, 410 (S.D.N.Y 2004), and we agree. In count two, At Home seeks disgorgement on the theory that an acquisition of a third-party company should be treated as a section 16(b) purchase when the acquisition target owned warrants to purchase stock of the issuer. The district court declined to match shares of different issuers to impose section 16(b) liability. Id. at 411. Although we disagree with the district court's reasoning with respect to this count, we conclude that in the context of this case there was no matching sale and purchase. We therefore affirm.

BACKGROUND

Because the district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), all facts are construed in At Home's favor. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

A

At Home Corporation ("At Home") was a provider of "always on" high-speed internet to home users. Cox and Comcast, which allegedly acted together as a "group," see 15 U.S.C. § 78m(d), collectively owned more than 17 percent of At Home's outstanding common stock. By June 1998, AT&T owned 35 percent of At Home's common stock. Although AT&T held the largest block of At Home stock, Cox and Comcast together could prevent AT&T from unilaterally controlling At Home's board of directors.

To consolidate its control of At Home, AT&T granted put options to Cox and Comcast.[1] A letter agreement entered March 28, 2000 ("Letter Agreement") set out the options' terms:

> AT&T grants to each of Cox and Comcast the right to put to AT&T . . . exercisable at any time . . . from January 1, 2001 through June 4, 2002, up to an aggregate number of shares of [At Home] stock . . . equal to the Maximum Number . . . [T]he "Maximum Number" with respect to Cox will be a number of [shares] having an aggregate purchase price under the Put equal to $1,397,500,800 and the "Maximum Number" with respect to Comcast will be a number of [shares] having an aggregate purchase price under the Put equal to $1,500,152,640. . . .
>
> The per share purchase price under the Put will be the greater of (1) $48 and (2) the average per share trading price of the [shares] on the Nasdaq . . . during the 30 consecutive trading day period beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of Put.

The Letter Agreement grants a "hybrid option," because the pricing formula has both fixed and floating components. The fixed component sets the exercise price at $48 per share if the options are executed while At Home is trading below $48 per share; if At Home shares trade consistently above $48 per share, the exercise price is calculated using the floating price mechanism. In either event, the total sale price is capped by the "maximum number": $1.4 billion for Cox and $1.5 billion for Comcast. (At Home contends, erron-

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[1] A "put option" is the right to sell a security at a specified price. Magma Power Co. v. Dow Chem. Co., 136 F.3d 316, 321 n 2 (2d Cir. 1998).

eously, that the fixed aggregate transaction amount means that there was no real fixed-price component.[2])

Comcast and Cox exercised the put options on January 11, 2001. This opened the 30-day window during which At Home's share price would be tracked for comparison to the $48 dollar price in order to determine both the final per-share price and the number of shares to change hands. Because At Home shares traded well below the $48 per share guaranteed price ($7.72 on January 11, 2001 to $6.00 on February 2, 2001), the exercise price was calculated at the $48 fixed price.

At Home argues that, for the purposes of section 16(b), the sale date was the exercise date (January 11, 2001), in which case Cox and Comcast would each be liable for profits earned on any At Home shares purchased between July 11, 2000 and July 11, 2001. Cox and Comcast argue (and the district court agreed) that because the Letter Agreement option was exercised at the fixed price, the date of sale for the purposes of section 16(b) was the date that the option was granted.

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[2] At Home argues that "the only fixed component at issuance was not the number of shares or price per share, but the total consideration to be paid by the grantor of the option (AT&T)." Appellant's Br. at 27 (emphasis in original). As the district court noted, this argument is spurious. As with many hybrid options containing floating and fixed price components, the Letter Agreement options contained a possible fixed price ($48 per share) payable depending on the market price at the time of exercise. The prospect of a higher exercise price does not mean that there is no fixed-price component; the prospect of a higher exercise price is what makes the option a "hybrid" in the first place. The maximum number of shares is likewise fixed: Where the put specifies both the maximum total payment and the fixed price per share, the number of shares in the transaction is fixed by long division—the maximum compensation divided by $48 per share equals the maximum numbers of shares to be sold at the fixed-price.

B

If the section 16(b) sale occurred as of the granting of the Letter Agreement option, it is undisputed that At Home's short-swing insider trading claim fails as to Cox: Cox purchased no shares of At Home in the six months before or after the date on which the option was granted. As to Comcast, however, At Home asserts in the alternative a theory of liability that treats the grant of the option as a sale, and would match that sale with Comcast's purchase of three cable systems whose holdings included warrants to purchase At Home stock.

Between January and August 2000, Comcast acquired three cable systems (Prime Communications, Jones Intercable, and Garden State Cablevision) for approximately $10 billion. The acquired companies allegedly held warrants to purchase 8.9 million shares of At Home stock, and the acquisitions thus had the effect of placing those warrants in Comcast's hands At Home Corp. v. Cox Commc'ns., Inc., 340 F Supp. 2d 404, 411 (S.D.N.Y. 2004). At Home argues that these acquisitions satisfy the purchase requirement of section 16(b).

DISCUSSION

The district court dismissed both claims pursuant to Fed. R. Civ. P. 12(b)(6). At Home Corp v. Cox Communications, Inc., 340 F. Supp. 2d 404 (S.D.N Y 2004). In dismissing count one, the district court reasoned that the *grant* of a hybrid option--rather than its *exercise*--is the only relevant section 16(b) event if the option is eventually exercised pursuant to the fixed-price mechanism. In dismissing count two, the district court applied the "unorthodox transaction" rule of Kern County Land Co v. Occidental Petroleum Corp., 411 U.S. 582 (1973), and determined that in the absence of any showing of manipulative intent, a sale of shares in one company cannot be matched for section 16(b) purposes with

a purchase of shares in another company, regardless of the holdings of either company.

We review de novo. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

I

Section 16(b) of the Securities Exchange Act of 1934 requires insiders to disgorge profits earned in short-swing trading.

> For the purpose of preventing the unfair use of information which may have been obtained by [an insider] by reason of his relationship to the issuer, any profit realized by him from any purchase, and sale, or any sale and purchase. of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such [insider] in entering into such transaction . . .

15 U.S.C. § 78p(b) (2005) (emphasis added). Section 16(b) operates mechanically, with no required showing of intent, see Steel Partners II, L.P. v Bell Indus., Inc., 315 F.3d 120, 123 (2d Cir 2002), but as applied to complex financial arrangements (such as hybrid options), the mechanism has wheels within wheels. When one transaction is a put option, there are two alternative potential dates of sale: the acquisition date and the date of execution.

In 1991, the SEC promulgated new rules to answer section 16(b) questions posed by options. As to options with fixed price components, the SEC is of the view that the greatest risk of short-swing profiteering arises at the point in time nearest the establishment of the option. See Ownership Reports and Trading By Officers, Directors and Principal Securities Holders, Exchange Act Rel. No. 28869 56 Fed. Reg. 7242, 7250, 7253 (Feb. 21, 1991), see also, At Home

v. Cox Commc'ns, Inc., 340 F. Supp. 2d 404, 410 n 10 (S.D.N.Y. 2004). The SEC's 1991 amendments to Rule 16b-6(a) account for that risk by providing that "the establishment of . . . a put equivalent position . . . shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act." 17 C.F.R. § 240.16b-6(a) (2005) (emphasis added). Correspondingly, under Rule 16b-6(b), "the disposition of underlying securities at a fixed price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act." 17 C.F.R § 240.16b-6(b) (emphasis added). Read together, the two rules treat the acquisition date of a put as the only sale date if the option is ultimately exercised according to a fixed price mechanism.

These rules decide this case. Comcast and Cox exercised their put options at the $48 fixed price. These options were "put equivalent positions" within the meaning of SEC rules.[3] The floating price mechanism did not affect the calculation of the exercise price.[4] Thus, the section 16(b) sale in this case occurred only with the acquisition of the letter agreement options, dated March 28, 2000. Cox, having purchased no

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[3] The SEC rules define a "put equivalent position" as "a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option." 17 C.F.R. § 240.16a-1(h) (emphasis added). Thus, the term specifically covers put options such as those involved in this case. Additionally, the puts at issue here are within the definition because their value increased as the value of At Home shares decreased: with a locked-in sale price, the option holders realized profit as At Home declined in price.

[4] We need not consider the § 16(b) ramifications of an option exercised according to a floating price mechanism. Judges of the Southern District of New York have taken varying approaches to this question. Compare Lerner v. Millenco, L.P., 23 F.Supp. 2d 337 (S D N.Y. 1998) (treating acquisition of put option as only § 16(b) sale) with Schaffer v. CC Invs., LDC, 280 F.Supp. 2d 128 (S.D.N.Y. 2003) (treating floating-price exercise as second § 16(b) event).

shares of At Home within six months of this date, is therefore not liable under section 16(b).

II

At Home alleges in the alternative--against Comcast only--that (for the purposes of section 16(b)) Comcast purchased shares of At Home by acquiring three cable systems whose assets included warrants to purchase At Home stock. It is an issue of first impression in the federal courts whether an insider's acquisition of stock in the issuer *by acquisition of a third-party intermediary company* gives rise to section 16(b) liability for short-swing profits (when matched with a sale of the issuer's stock).

A

The district court treated indirect acquisition as a "borderline transaction" within the meaning of Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 594 (1973), and therefore analyzed whether such transactions serve as a "vehicle for the evil which Congress sought to prevent--the realization of short-swing profits based upon access to inside information." Id. This analysis was misplaced. Kern County presented a borderline case because--although Occidental owned more than 10 percent of Kern County shares, and sold and purchased Kern County shares within six months--Occidental was an atypical insider in two ways: (i) it lacked access to inside information and (ii) its shares were sold involuntarily. *Id.* at 596-598, 600. Section 16(b) liability was inappropriate because the Supreme Court saw "nothing . . . to indicate either the possibility of inside information being available to Occidental . . . or the potential for speculative abuse of such inside information." Id. at 599 (emphasis added). This Circuit has suggested that these factors--an involuntary transaction by an insider having no access to inside information--are prerequisites to use of the

Kern County analysis. See American Standard Co. v. Crane Co., 510 F.2d 1043, 1054-55 (2d Cir. 1974).

At Home presents a novel theory of insider purchasing; but novelty alone does not justify resort to Kern County's "borderline transaction" framework. Kern County controls when the insider is atypical as well as the transaction. Comcast, however, was a garden-variety insider. Kern County therefore does not resolve this case.

B

Section 16(b) speaks of matching transactions in the equity securities of one issuer, and disgorging "any profit realized . . . from any purchase and sale, or any sale and purchase, of any equity security of such issuer." 15 U.S.C. § 78p(b) (2005) (emphasis added). Use of the singular ("any equity security" and "such issuer") supports an inference that a transaction in the equity securities of one company cannot be matched with a transaction in the equity securities of another. That inference is reinforced by Congress's intent that the statute "be simple and arbitrary in its application." Whiting v. Dow Chem. Co., 523 F 2d 680, 687 (2d Cir 1975).

The Securities and Exchange Commission ("SEC"), as amicus curae, argues that the same result is compelled by contrasting [i] the "evils of insider trading" that concerned Congress, see Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422 (1972), with [ii] the risks that arise when the issuer's stock is acquired indirectly by merger with another company.[5] SEC Br. at 12-14. The SEC reminds us that Congress enacted section 16(b) out of concern for the "class of transactions in which the possibility of abuse was believed

[5] The SEC claims that this Court "owes controlling deference to the . . . interpretation of . . . Section 16(b) . . . provided in [the SEC's] amicus brief." SEC Br. at 18. Because we are persuaded by the SEC's argument, we need not decide whether the amicus brief would otherwise command deference.

to be intolerably great." Id. at 12 (quoting Kern, 411 U.S. at 592 (internal citations omitted)). The SEC (an agency uniquely experienced in confronting short-swing profiteering) convincingly argues that a typical change-of-control transaction does not present an intolerable risk of abuse

> An insider who seeks to profit from inside information typically will engage in a purchase or sale in the issuer's securities, and then engage in an opposite-way transaction when the information becomes public, and the securities' price is affected. A change in control, however, is typically motivated by a desire to acquire control of a company. It also involves complex negotiations, and many strategic corporate considerations, and often involves regulatory review and approval. While it is not beyond possibility that an acquiror would tailor a change in control transaction to obtain short-swing profits from insider trading, it is certainly not going to be a common scenario. Good faith change in control transactions are not ones "in which the possibility of abuse [is] intolerably great."

Id. at 13-14 (emphasis added; emendation in original)

No one seeking an insider's edge speculating in the shares of an issuer would pursue that advantage by acquiring other companies if no more than a small fraction of the purchase price could be (notionally) attributed to the shares of the issuer. It would be like speculating in tractors by buying a farm.

The acquisition of three operating cable systems for $10 billion entails great risk and high transaction costs. See Carol B. Swanson, The Turn in Takeovers: A Study in Public Appeasement and Unstoppable Capitalism, 30 Ga. L. Rev. 943, 954-55 (1996) (estimating transaction costs in leveraged buyout to reach "four percent of the company's purchase price and more than five percent of the market value at the

time of the offer"); Louis Lowenstein, Opinion, 2 Merger & Acquisitions L. Rep. 427, 430 (1989) (estimating transaction costs as four to five percent of acquisition price, regardless of the size of the deal); see also Robert Smiley, Tender Offers, Transaction Costs and the Theory of the Firm, 58 Rev. Econ. & Stat. 22, 29-30 (1976) (calculating median transaction costs at over thirteen percent of post-tender offer market value). As the district court observed, Comcast's maximum profit from the indirect purchase of At Home warrants would constitute less than five percent of the price Comcast paid for the cable companies. See At Home, 340 F.Supp.2d at 411 n.12.

We cannot generalize from the risk calculus of the particular transactions at issue on this appeal. We appreciate that indirect purchasers may on occasion seek to take advantage of inside information, and may succeed in doing so. However, "while there may be evils to be redressed arising out of [a] kind of corporate maneuvering, § 16(b) is simply not an antidote to all the ills that may plague the securities market." Heublein, Inc. v. Gen Cinema Corp., 722 F.2d 29, 31 (2d Cir. 1983). The various prohibitions on insider trading work together: The more a transaction is crafted to evade section 16(b), the stronger the case for holding an insider liable under section 10(b). Moreover, a different analysis may control if an indirect sale or purchase is nothing but a tactic to evade section 16(b), as, for example, if an insider acquires a holding company that has no appreciable assets other than shares of the issuer, or that holds a certain proportion of its assets in the stock of the issuer. However, we do not consider such pass-through transactions. We conclude that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks and opportunities independent of the risks and opportunities that inhere in the stock of the issuer.

We therefore reject At Home's effort to treat Comcast's cable system acquisitions as section 16(b) purchases Since At Home has alleged no other purchase to match Comcast's March 28, 2000 sale of At Home stock, the claim against Comcast fails, and was properly dismissed by the district court.

CONCLUSION

We have considered the parties' remaining arguments and find each of them to be without merit. For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Filed June 6, 2006]

AT HOME CORP.

v.

COX COMMUNICATIONS, INC.

05-0115-cv

ERRATA

PAGE	LINE	DELETE	INSERT
2710	29 (after existing list of attorneys, before the centered half-line, add the following in the same format)		BRIAN G. CARTWRIGHT, General Counsel of the Securities and Exchange Commission (Jacob H. Stillman, Solicitor, Eric Summergrad, Deputy Solicitor, Allan A. Caputo, Special Counsel to the Solicitor), Washington, D.C., for Amicus Curiae Securities and Exchange Commission.
2713	7	Maximum Number [T]he "Maximum Number. . . ." with respect to Cox	Maximum Number. . . . [T]he "Maximum Number" with respect to Cox
2720	5	amicus curae	amicus curiae

Distribution:
X Judges Cabranes and Sack
X West Publishing Co.
X Clerk

SO ORDERED:
/s/ Dennis Jacobs
DENNIS JACOBS
Circuit Judge
Date: June 5, 2006

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed April 28, 2006]

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 28th Day of April, two thousand and six.

Before: Hon. Dennis Jacobs,
Hon. José A. Cabranes,
Hon. Robert D. Sack,
Circuit Judges

Docket No. 05-0115-cv

AT HOME CORPORATION,
PLAINTIFF-APPELLANT,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS and DAVID M. WOODROW,
DEFENDANT-APPELLEES.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

by /s/ Arthur M. Heller
ARTHUR M. HELLER
Motions Staff Attorney

ISSUED AS MANDATE: 5/26/06

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 Civ. 8094 (NRB)

AT HOME CORPORATION,

Plaintiff,

against

COX COMMUNICATIONS, INC., COX @ HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS INC., BRIAN L. ROBERTS, DAVID M. WOODROW,

Defendants.

AMENDED MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD,
UNITED STATES DISTRICT JUDGE

Plaintiff At Home Corporation has brought this action against defendants Cox Communications, Inc., Cox@home, Inc. (collectively, "Cox"); Comcast Corporation, Comcast Online Communications, Inc., Comcast Pc Investments Inc. (collectively, "Comcast"); Brian L. Roberts; and David M. Woodrow, asserting two causes of action for insider "short swing" profits in violation of § 16(b) of the Securities Exchange Act of 1934 and a third cause of action for breach of fiduciary duty. Now pending are motions by defendants Comcast and Cox to dismiss the two § 16(b) causes of action. We heard oral argument on defendants' motions on June 16, 2004. For the reasons set forth below, defendants' motions are granted.

BACKGROUND

At Home was founded by cable companies to provide cable-based high-speed internet access to customers. According to the complaint, during the relevant period, defendants Cox and Comcast collectively owned more that ten percent of the outstanding shares of At Home Series A common stock and acted as a group, thereby qualifying as "insiders" subject to trading restrictions. The other controlling shareholder was Tele-Communications, Inc., which was acquired by AT&T on June 23, 1998.

The transactions giving rise to plaintiff's § 16(b) causes of action were, according to the complaint, part of an effort by AT&T to expand its control over At Home. Compl. ¶ 40. On March 28, 2000, AT&T, Cox and Comcast entered a letter agreement ("the Agreement") under which defendants acquired certain puts (rights to sell shares) ("the Puts"). Specifically, Cox acquired the right to sell At Home shares to AT&T for up to $1.4 billion, and Comcast acquired the same right up to $1.5 billion. Opp'n, Ex. B. Although the number of shares to be sold was not fixed, the Agreement specified a share price containing a fixed and a floating component. Id. Specifically, defendants acquired the right to sell their shares to AT&T for "the greater of (1) $48 and (2) the average per share trading price . . . during the 30 consecutive trading day period beginning 15 trading days immediately prior to . . . AT&T's receipt of the notice of exercise of the Put." Id.

Around the time when defendants reached the above agreement with AT&T, defendant Comcast acquired several cable companies by stock purchase: Garden State Cablevision, L.P. (January, 2000); Jones Intercable, Inc. (March, 2000); and Prime Communications-Potomac, LLC and Chicago, LLC (August, 2000). These companies collectively ow. d warrants to purchase approximately 8.9 million shares of At Home.

On January 11, 2001, defendants notified AT&T of their intention to exercise their Puts, in two nearly identical letters. Opp. Exs. C and D. Defendants stated that "[b]ased on current market conditions, [they had] assumed that the purchase price under the Put [would] be $48 per share." Id. At that time, At Home common stock shares were selling at $7.72. According to the complaint, because AT&T faced enormous tax liabilities if it purchased defendants' shares, the parties entered into a new agreement on May 18, 2001 whereby defendants canceled the Puts in exchange for 155.3 million shares of AT&T stock, at that time worth 3.43 billion. Compl. ¶ 56. As a result of this modified agreement, Comcast recorded a pre-tax gain of $296.3 million and Cox recorded pre-tax gain of $307.4 million. Id. at ¶ 57.

This action followed.

DISCUSSION

I. Legal Standard

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), we accept as true all material factual allegations in the complaint, Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l, Ltd., 968 F.2d 196, 198 (2d Cir. 1992), and may grant the motion only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996); see Conley v. Gibson, 355 U.S. 41, 48 (1957). At the same time, we are not required to accept any legal conclusions contained in the complaint. Papasan v. Allain, 478 U.S. 265, 286 (1986); Joint Council, etc. v. Delaware L. & W. R.R., 157 F.2d 417, 420 (2d Cir. 1946).

In addition to the facts set forth in the complaint, we may also consider documents attached thereto and incorporated by reference therein, Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 67 (2d Cir. 1998), as well as matters of public record, Pani v. Empire Blue Cross

Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998), cert. denied, 525 U.S. 1103 (1999).

II. Section 16(b) of the Exchange Act

Section 16(b) of the Exchange Act[1] provides that "a beneficial owner of more than ten percent of any class of equity security must turn over any profits earned, regardless of intent, from a purchase and sale of the securities occurring within six months." Global Intellicom, Inc. v. Thomson Kernaghan & Co., 1999 WL 544708, *13 (S.D.N.Y. July 27, 1999). The purpose of the statute is to "prevent[ ] the unfair use of information" which such beneficial owners, as well as officers and directors, are presumed to possess "by reason of [their] relationship to the issuer." 15 U.S.C. § 78p(b) (emphasis added). Thus, 16(b) is not aimed at any benefits (such as plaintiff implies defendants derived) from an insider's market power.

Because § 16(b) is a strict liability penalty (applying regardless of whether the insider actually used its access to inside information), the Supreme Court has expressed a "reluctan[ce] to exceed a literal, "mechanical" application of the statutory text in determining who may be subject to liability, even though in some cases a broader view of statutory liability could work to eliminate an 'evil that Congress sought to correct through § 16(b).'" Gollust v. Mendell, 501 U.S. 115, 122 (1991) (quotation omitted).

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[1] Section 16(b) reads in pertinent part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner . . . any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner . . . in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months.

III. Plaintiff's Causes of Action

A. First Cause of Action

Plaintiff's first cause of action alleges that § 16(b) requires defendants to disgorge the profits they made by creating the Puts and then cancelling them.

At issue is the character of the Agreement under § 16(b). In 1991, the SEC amended its rules to provide that the acquisition of "derivative" securities, i.e., instruments that derive their value from the value of the underlying stock, falls within § 16(b). 17 C.F.R. § 240.16a-1(d). The securities acquired by defendants through the Agreement were a type of derivative: an option to sell At Home shares at some future date (also known as a "put").[2] Under SEC regulations, while the establishment of a put is a § 16(b) "sale," see 17 CFR § 240.16b-6, the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) . . ." 17 C.F.R. § 240.16b-6(b) (emphasis added).

Sections § 240.16b-6 and 240.16b-6(b) conform to the purpose of 16(b) because they target the point in the transaction series when the threat of insider trading is greatest. Just as, under the traditional scenario, an insider who learns of an imminent dip in stock value might sell his shares and then repurchase them at a profit once the stock dips, that same insider might achieve the same results by purchasing fixed-price puts.[3] By contrast, an insider with the same information

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[2] A put derives its value inversely from the value of the underlying stock. That is, as the value of the stock declines, the value of the option to sell that stock at a pre-fixed price increases.

[3] As the Second Circuit explained in Magma Power Co. v. Dow Chemical Co., 136 F.3d 316, 322 (2d Cir. 1998), "[i]n essence, an insider who takes an option position is making a bet on the future movement of the price of the underlying securities; the odds in the insider's favor are foreshortened if the wager is backed by inside information."

who already possesses puts need not trade on the information because his sale price is already locked in and will not be affected by the imminent dip; for this reason, the exercise of a fixed-price option is a non-event under § 16(b).

The calculation is different for another common type of derivative: the "floating price" derivative, or option to buy or sell at a price keyed to the market price at the time of exercise. This type of option does not pose a risk of insider trading at the time of its creation because it does not lock in a price that may profitably diverge from the market price (i.e., once the inside information reaches the market). Instead, the greatest risk occurs when a holder exercises floating options. For example, if Company A, an insider of company B, holds options to buy shares of Company B at 95 percent of their market price and later learns that the price of B stock is about to briefly surge, A may exercise its right, and then promptly resell its shares just after the surge.

The SEC has responded to the different risks posed by floating-price derivatives by interpreting § 16(b) such that

> a right with a floating exercise price is not required to be reported and will not be deemed to be acquired or purchased, for Section 16 purposes, until the purchase price of the underlying securities becomes fixed or established, which commonly occurs at exercise. Thus, a right to purchase an equity security is deemed acquired as of the date the exercise or conversion price becomes fixed, and the acquisition, absent an exemption, would be matchable for Section 16(b) purposes with a disposition within six months of the fixing of the price.

Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Exchange Act Release No. 28869 [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,709, at 81,265 (Feb. 8, 1991).

The question presented by the instant case, which has been addressed (in defendants' favor) by three courts of this district, see infra, but which has not yet been addressed by the Second Circuit, is how to apply § 16(b) to options containing both a fixed and a floating component ("hybrids"). Plaintiff's first cause of action alleges that § 16(b) requires defendants to disgorge the profits from their May 18, 2001 agreement to cancel their puts because this purchase-equivalent transaction occurred within six months of defendants' sale-equivalent decision on February 11, 2001 to exercise the Puts. Defendants move for dismissal of this cause of action on the ground that, even if all the facts alleged in the complaint were true, the sole proper 16(b) sale-equivalent event would still be the March 28, 2000 creation, not the exercise, of the Puts.[4] We agree.

As noted earlier, defendant's characterization of the Puts is supported by the three opinions of this Court that address the question of how to treat hybrid options under § 16(b).[5] In

[4] The following chart may clarify the sequence of events:

Date	Event
March 28, 2000	The Puts are created.
February 11, 2001	Defendants notify AT&T of their decision to exercise the Puts.
May 18, 2001	Defendants agree to cancel the Puts in exchange for AT&T stock.

[5] We are wholly unpersuaded by plaintiff's argument that, because the Agreement specified as the per share price "the greater of (1) $48 and (2) the average per share trading price . . . during the 30 consecutive trading day period beginning 15 trading days immediately prior to . . . [defendants'] exercise of the Put" (emphasis added), and the agreements at issue in the other cases use the term "or" to connect the fixed and floating price-components, these cases are thereby distinguishable. See Opp'n at 24-26. This linguistic distinction is an empty one; the phrase "the greater of X and Y," whether or not it is grammatically correct, is clearly meant to express the same thing as "the greater of X or Y," because there is no other logical interpretation.

Lerner v. Millenco, 23 F. Supp.2d 337 (S.D.N.Y. 1998), the interest consisted of certain debentures convertible into common stock under a hybrid pricing structure. Specifically, the debentures were convertible at the lesser of "(1) 80 percent of the average of the closing price of EA common stock as traded on the New York Stock Exchange on the five days immediately preceding the date on which the holder provided EA with notice of conversion; or (2) $4.00 per share." Id. at 339. Lerner argued that, even though defendants had exercised their options under the fixed price, the options more closely resembled floating options and therefore the date of their exercise should be deemed a § 16(b) event. The court rejected this argument, finding that the hybrid options at issue functioned more like fixed options because they could be acquired for the purpose of locking in a minimum profit at the time of creation. Accordingly, the court found that defendants' exercise of their options was not a § 16(b) event.

Judge Schwartz, in Levy v. Oz Master Fund, Ltd., No. 00-7148 (AGS), 2001 WL 767013 (S.D.N.Y. July 9, 2001), reached the same conclusion with respect to preferred stock which was convertible to common stock under a hybrid pricing structure. The court found that, regardless of whether the options were ultimately exercised under the floating rate or the fixed rate,[6] the creation of the options was the sole § 16(b) event. Id. at *8. As in Lerner, the Oz court viewed the ability to lock in a profit at the creation of the options as far more significant, and therefore worthy of § 16(b) treatment, than any presumed enhancement of profits when hybrid options are exercised at the floating rate.

Since Lerner and Oz, the SEC has provided guidance on the treatment of hybrid instruments in an amicus brief submitted in Levy v. Southbrook Intern. Investments, Ltd., 263

[6] In Oz, defendants had exercised their option under the floating rate.

F.3d 10 (2d Cir. 2001) (00-7630).[7] Although the SEC did not specify exactly how to apply § 16(b) to hybrids, the SEC did explain that

> [The defendant] acquired an indirect pecuniary interest in that minimum number of common shares at the time [the defendant] acquired the convertible preferred stock. However, [the defendant] would not acquire a pecuniary interest in any additional shares of common stock through the convertible preferred stock before its conversion, at which time the conversion price would fix to determine what – if any – additional shares of common would be obtained through the floating price component.

(Emphasis added.)

This characterization suggests that the proper way to treat hybrids under 16(b) is as two separate transactions. The first transaction, the creation of the interest, is equivalent to fixed price options, and is always a § 16(b) event. The second transaction is a theoretical modification of the fixed price, but the value of this modification is measured as the difference between the initial fixed price and the exercise price. Where the initial fixed price becomes the exercise price (because it is more advantageous than the floating price), the date of exercise has no § 16(b) significance.[8]

At least one other judge in this Court has read the SEC brief in this way. See Schaffer ex rel. Lasersight Inc. v. CC Investments, LDC, 280 F. Supp.2d 128, 139-140 (S.D.N.Y. 2003) ("[U]nder the SEC's reasoning, the acquisition (or disposition) of a hybrid instrument results in (1) an immediate

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[7] Although the brief clarified the SEC's position on hybrids, this issue was not ultimately the basis for the Second Circuit's holding.

[8] This conclusion is fully consistent with the holding of the primary case relied on by plaintiff, Levy v. Clearwater Fund IV, Ltd., No. 99-004 (SLR), 2000 WL 152128 (D. Del. Feb. 2, 2000), as in that case, unlike here, defendants exercised their options at the floating price, id. at *2.

acquisition (or disposition) of a derivative security with respect to the minimum number of shares of underlying common stock that can be acquired under the fixed rate component, and (2) a subsequent purchase (or sale) at the time of conversion of any additional shares acquired (or disposed of) at that time under the floating rate component.") (emphasis added).

This reading also comports with the language of 17 C.F.R. § 240.16b-6(b), which exempts from § 16(b) "the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position" (emphasis added), without requiring that the price be fully fixed from the moment the put is created.

In the instant case, it is undisputed that, at the time defendants exercised their options, the floating price was irrelevant because it was far below the fixed minimum of $48 per share. Plaintiff argues that we should nonetheless treat the interest in this case as a purely floating derivative because the initial Puts agreement, while it fixed a maximum overall price and a minimum price-per-share, never fixed the precise number of shares to be sold.[9] However, this characterization is misleading. The specified maximum overall price of $2.9

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[9] During oral argument, plaintiff stressed, as further support for their position, that the structure of the Agreement was such that defendants could not have completed the SEC disclosure form, Form 4, which insiders are required to file for any purchase or sale of stock, because the Agreement did not specify an exact price-per-share (a required category of the Form 4). Tr. 3-5. However, as we pointed out at oral argument, any hybrid derivative would give rise to the same problem. Tr. 33. Moreover, as defendants observed, see id., this problem is not insurmountable. Since a Form 4 filed at the time a hybrid is created is required because of the danger that an insider might be locking in a minimum profit via the fixed-price-component, it is that component which is the relevant price-per-share and which therefore should be disclosed on the form. In this case, therefore, defendants could have filed an effective Form 4 specifying $48 as the price-per-share.

billion, when combined with the specified minimum per-share price of $48, dictated that defendants could sell, at most, 60.4 million shares. Thus the initial agreement did limit the number of shares which AT&T would be required to buy. Moreover, plaintiff has not offered any policy reason for treating hybrids differently depending on whether they specify a maximum number of shares or a maximum overall price, or for targeting the exercise of options under the fixed-price component.[10]

For these reasons, we find that neither defendants' January 11, 2001 decision to exercise their Puts nor the February 2, 2001 date on which the (by then irrelevant) floating price component became fixed qualifies as a 16(b) event. Thus, the only sale-equivalent event was the March 28, 2000 Agreement, which occurred more than six months before the only conceivable purchase-equivalent event: the May 18, 2001 cancellation of the Puts. As plaintiff's first cause of action fails to identify matching transactions occurring within six months of each other, defendants' motions to dismiss the first cause of action are granted.

B. Second Cause of Action

As an alternative to its first cause of action, plaintiff has pled that the creation of the Puts can be matched, under 16(b), with defendant Comcast's purchase of several cable companies that themselves possessed warrants to purchase At Home stock. As set forth supra, around the time when defendants entered the Agreement with AT&T, Comcast ac-

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[10] During oral argument, we repeatedly asked plaintiff to articulate a scenario in which the floating component, though practically irrelevant at the time of exercise, created a risk of short-swing insider trading. Plaintiff was unable to do so. Tr. 34-35, 41-42, 61-63. Judge Schwartz asked the same question in Levy, and concluded that "from the perspective of Rule 16(b), the security with the hybrid conversion feature is no different from a security with a fixed price option when the market price is below the fixed conversion price." Levy, 2001 WL 767013, at *7.

quired, through stock purchases, three cable companies: Garden State Cablevision, L.P. (January, 2000); Jones Intercable, Inc. (March, 2000); and Prime Communications-Potomac, LLC and Chicago, LLC (August, 2000). These companies collectively owned warrants to purchase approximately 8.9 million shares of At Home. The second cause of action is only against Comcast, not Cox.

As used in § 16(b), "[t]he terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire" any equity security. 15 U.S.C. § 78c(a)(13). Whether this definition covers the situation in which Company A, an insider of Company B, buys Company C, and among the assets of Company C are warrants to purchase Company B shares, appears to be an issue of first impression.[11] We agree with defendants that, if anything, this absence of precedent favors them. It is unlikely that, until now, no insider has gained warrants to purchase stock in a company (in the manner described above) within six months of selling (or engaging in a sale-equivalent transaction involving) shares of the company.

"In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to inside information." Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 594 (1973). We can conceive of situations where an insider could acquire one company simply (or mainly) to obtain its interests in the subject company, as when the

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[11] Plaintiff obscures this dearth of authority by citing to cases in which an insider specifically and directly purchased warrants for the subject company from a third company. Magma Power Co. v. Dow Chemical Co., 136 F.3d 316, 322 (2d Cir. 1998); Morales v. Mapco, Inc., 541 F.2d 233, 236 (10th Cir. 1976), cert. denied sub nom. Ross v. Morales, 429 U.S. 1053 (1977). Such cases are totally inapposite to the facts at hand.

acquired company has few other assets or exists for the sole purpose of trading in shares of the subject company. However, plaintiff has failed to plead any facts giving rise to such a possibility here.

According to the complaint, Comcast's purchases yielded warrants to purchase approximately 8.9 million shares of At Home. It is undisputed that Comcast paid nearly $10 billion to acquire the cable companies, and that Comcast was previously a part owner of one company, a controlling shareholder of another, and a creditor of the third. Korpus Dec. Ex. C. It is also undisputed that, during the period in which Comcast inherited these warrants, At Home's share price was in the range of $13.31 to $43.44. Id. Ex. A.[12]

Given these undisputed facts, we can conceive of no set of further facts which would demonstrate that the transactions were of a type warranting § 16(b)'s presumption of abuse. Accordingly, Comcast's motion to dismiss plaintiff's second cause of action is granted.[13]

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[12] Given the figures involved, it is inconceivable that Comcast could have purchased these companies for their warrants. For present purposes, we will assume that the warrants were extremely valuable, e.g., were warrants to purchase shares for $1. These warrants would then have been worth approximately $27.38/share, as the average between the trading high and low during that period was $28.38. Their overall value would then have been $243.64 million, less than 3% of the price Comcast paid for the cable companies.

[13] Because we agree with defendants on the merits, we need not reach defendants' argument that the second cause of action is not timely. We note, however, that had we agreed with plaintiffs that defendants' acquisition of the cable companies was a § 16(b) event, the recently decided Second Circuit opinion Litzler v. CC Investments, L.D.C., 362 F.3d 203, 205 (2d Cir. 2004), which holds that the two-year statute of limitations is tolled whenever a defendant fails to comply with § 16(b) disclosure requirements, would seem to apply.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss plaintiff's first and second causes of action are granted. The parties are directed to appear for a conference in Courtroom 21A on September 9, 2004 at 11:30 a.m.

SO ORDERED.

DATED: New York, New York
August 17, 2004

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing have been mailed on this date to the following:

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Jan. 4, 2005]

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03 CIVIL 8094 (NRB)

AT HOME CORP.,

Plaintiff,

-against-

COX COMMUNICATIONS INC., et al.,

Defendants.

AMENDED JUDGMENT

Defendants having moved this Court to dismiss the first and second causes of the action, and the Court, on August 12, 2004, having issued a Memorandum and Order dismissing the first two causes of action, the Court, on December 3, 2004, having issued its Order dismissing the third cause of action and directing the Clerk to enter judgment dismissing the action without prejudice and without costs, it is,

ORDER, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dtd. Aug. 12, 2004, the first two causes of action are dismissed, and for the reasons stated in the Court's Order of Dismissal, dated, Dec. 3, 2004, the third cause of action is dismissed without prejudice and without costs.

Dated: New York, New York
December 8, 2004

J. Michael McMahon
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

APPENDIX F

Section 3(a)(13) of the Securities Exchange Act of 1934
15 U.S.C. § 78c(a)(13)

(a) Definitions

When used in this chapter, unless the context otherwise requires--

(13) The terms "buy" and "purchase" each include any contract to buy, purchase or otherwise acquire. For security futures products, such term includes any contract, agreement, or transaction for future delivery.

Section 16(b) of the Securities Exchange Act of 1934
15 U.S.C. § 78p(b)

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not re-purchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of

competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

SEC Rule 16a-1(c)(6)
17 C.F.R. § 240.16a-1(c)(6)

Definition of Terms.

Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder. These terms shall not be limited to section 16(a) of the Act but also shall apply to all other subsections under section 16 of the Act.

(c) The term derivative securities shall mean any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security, but shall not include:

(6) Rights with an exercise or conversion privilege at a price that is not fixed.

SEC Rule 16a-1(h)
17 C.F.R. § 240.16a-1(h)

Definition of Terms.

Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder. These terms shall not be limited to section 16(a) of the Act but also shall apply to all other subsections under section 16 of the Act.

(h) The term put equivalent position shall mean a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position.

SEC Rule 16b-6(a)
17 C.F.R. § 240.16b-6(a)

Derivative securities.

(a) The establishment of or increase in a call equivalent position or liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) of the Act, and the establishment of or increase in a put equivalent position or liquidation of or decrease in a call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act: Provided, however, that if the increase or decrease occurs as a result of the fixing of the exercise price of a right initially issued without a fixed price, where the date the price is fixed is not known in advance and is outside the control of the recipient, the increase or decrease shall be exempt from section 16(b) of the Act with respect to any offsetting transaction within the six months prior to the date the price is fixed.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

[Filed Sept. 24, 2002]

02-1486

AT HOME CORPORATION,

Plaintiff,

- against -

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff At Home Corporation ("At Home" or the "Company"), by the Official Committee of Unsecured Bondholders of At Home Corporation (the "Bondholders Committee"), and its attorneys, Weil, Gotshal & Manges LLP and The Bayard Firm, for its complaint against defendants Cox Communications, Inc., Cox@Home, Inc. (collectively, "Cox"), Comcast Corporation, Comcast Online Communications, Inc., Comcast PC Investments Inc. (collectively, "Comcast"), Brian L. Roberts and David M. Woodrow (all defendants collectively referred to as "defendants") alleges, upon knowledge as to itself and upon information and belief as to defendants, as follows:

NATURE OF THE ACTION

1. This action arises from (a) the realization of at least $600 million of illegal "short swing" profits by defendants

Cox and Comcast in violation of Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act") from transactions in the common stock of now bankrupt At Home, and (b) related breaches of fiduciary duties owed to At Home that paved the way for these massive insider profits.

2. Acting at all times in a closely coordinated fashion as a "group" under the federal securities laws, Cox and Comcast together beneficially owned more than 10% of At Home's common stock, thus qualifying as a statutory "insider" under Section 16(b). Together Cox and Comcast negotiated for the valuable right to "put" some or all of their At Home shares (depending on the market price) to AT&T; together they gave notice to AT&T that they were selling their At Home shares pursuant to the "put" (thus fixing the number of shares subject to the "puts" and the price per share that AT&T would pay); and together they cancelled this "put"—thus retaining their At Home Shares—in exchange for a payment from AT&T of approximately 53.4 billion worth of AT&T common stock. As a result of these insider transactions, Cox and Comcast have admitted publicly to at least $600 million of profits, and their unlawful profits under Section 16(b) may be far greater. Comcast also has admitted in Bankruptcy Court that Section 16(b) imposes liability on corporate insiders (like Comcast and Cox), who profit from the short swing purchase and sale of securities, without regard to the intent of the insider. Cox and Comcast must now repay their "short swing" profits to At Home's estate.

3. As explained below, Cox and Comcast reaped their tremendous windfall as a direct result of egregious breaches of their fiduciary duties owed to At Home as controlling shareholders. The three controlling shareholders of At Home —AT&T Corporation ("AT&T"), Cox and Comcast—each used their insider positions to force the Company to enter into a series of convoluted and interconnected agreements in March 2000 (the "March 2000 Transactions" or "Trans-

actions") that benefited the controlling shareholders, but left At Home critically weakened.

4. The March 2000 Transactions transferred complete control to AT&T over At Home's Board of Directors, and allowed Cox and Comcast to sever their relationship with At Home both as shareholders and major customers on very favorable terms. First, the March 2000 Transactions afforded Cox and Comcast an enormously lucrative financial exit from their At Home investment in the form of their $3 billion "put" to AT&T of their At Home common stock. Second, the March 2000 Transactions allowed Cox and Comcast to escape critical contractual ties that required Cox and Comcast to offer their cable customers high speed internet access exclusively on At Home's system. As part of the March 2000 Transaction, Cox and Comcast also demanded that if they decided to escape from their contractual commitments with At Home, At Home would assist Cox and Comcast in moving their cable subscribers to a competing high speed internet access service. Absent these transition services, Cox and Comcast could not terminate their relationships with At Home without the risk of tremendous service disruptions and substantial losses of customers. By providing Cox and Comcast with not only the ability to escape their contractual agreements with At Home, but also to obtain At Home's help in transferring their customers to a competitor, At Home gave away critical leverage with Cox and Comcast to keep them as customers and to have them pay as high a price as this leverage would require that they pay for the services provided by At Home.

5. In short, At Home's controlling shareholders obtained enormous benefits from the March 2000 Transactions: AT&T acquired complete control over At Home's Board of Directors; Cox and Comcast received the right at a future date (ultimately worth billions of dollars) to sell some or all of their At Home stock to AT&T, as well as an exit strategy

from their contractual ties to At Home. The only "loser" was At Home itself which received unfair and inadequate consideration for participating in the Transactions. The Transactions left At Home in a weakened bargaining position with Cox and Comcast, two of their largest cable company customers, concerning the future use by Cox and Comcast subsidiaries of the At Home system. Indeed, on June 18, 2001, within days of realizing their enormous "short-swing" profits from At Home stock, Cox and Comcast notified At Home of their decision to cancel their agreement to use At Home's high-speed Internet service on an exclusive basis for their cable customers—a decision only made possible by the March 2000 Transactions.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action and the claims asserted herein pursuant to § 27 of the Exchange Act, 15 U.S.C. § 78aa, as this action arises under the federal securities laws, and pursuant to 28 U.S.C. §§ 1331 and 1367.

7. Venue lies in the United States District Court for the District of Delaware pursuant to § 27 of the Exchange Act, 15 U.S.C. § 78 aa, and 28 U.S.C. § 1391(b)-(c).

8. Defendants Brian Roberts and David Woodrow served as directors of At Home, a Delaware corporation, and are therefore subject to suit in Delaware for alleged breaches of the fiduciary duties they owed to At Home. 10 Del. C. § 3114.

PARTIES

9. Plaintiff At Home is a corporation organized and existing under the laws of the State of Delaware, and at all relevant times herein had its principal place of business in Redwood City, California. At Home was formed to develop and provide high-speed Internet access to cable companies. At Home filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code on September 28, 2001.

10. Pursuant to the May 13, 2002 Order of the United States Bankruptcy Court for the Northern District of California, the Bondholders Committee has been appointed provisional representative of At Home for the express purpose of asserting claims belonging to At Home (including the claims alleged herein) against Cox, Comcast and others.

11. Defendant Cox Communications, Inc. ("CCI") is a company organized and existing under the laws of the State of Delaware. CCI's principal place of business is located at 1400 Lake Hearn Drive, N.E., Atlanta, Georgia. CCI is engaged in the business of communications, cable television and telecommunications technology. As of March 28, 2000, CCI claimed beneficial ownership of 29,114,600 shares of At Home Series A common stock, representing 8.3% of the outstanding shares of At Home Series A common stock (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, CCI beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Comcast entities.

12. Defendant Cox@Home, Inc., f/k/a Cox Teleport Providence, Inc., ("Cox@Home"), a wholly owned subsidiary of CCI, is organized and existing under the laws of the State of Delaware with its principal place of business also located at 1400 Lake Hearn Drive, N.E., Atlanta, Georgia. As of March 28, 2000, Cox@Home claimed legal and beneficial ownership of the 29,114,600 shares of At Home Series A common stock, discussed above in paragraph 11 (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, Cox@Home beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Comcast entities.

13. Defendant Comcast Corporation is a corporation organized under the laws of the State of Pennsylvania, and has its principal place of business at 1500 Market Street, Philadelphia, Pennsylvania. Comcast Corporation is engaged principally in the development, operation and management of telecommunications and cable television including in the State of Delaware. As of March 28, 2000, Comcast Corporation claimed beneficial ownership of 31,118,924 shares of At Home Series A common stock, representing 8.8% of the outstanding shares of At Home Series A common stock (Comcast Corporation claimed ownership of 31,253,180 shares of At Home Series A common stock, representing 9.8% of the outstanding shares of that series as of January 11, 2001). As alleged below, Comcast Corporation beneficially owned in excess of 17% of the At Home's outstanding Series A common stock because it was part of a group which at least included At Home shares owned by Cox entities.

14. Defendant Comcast Online Communications, Inc. ("Comcast Online") is a wholly owned subsidiary of Comcast Corporation and is a company organized and existing under the laws of the State of Delaware. Comcast Online's principal place of business is located at 1500 Market Street, Philadelphia, Pennsylvania. As of March 28, 2000, Comcast Online owned 100% of Comcast PC Investments Inc. and claimed beneficial ownership of 29,114,600 shares of At Home Series A common stock, representing 83% of the outstanding shares of At Home Series A common stock (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, Comcast Online beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Cox entities.

15. Defendant Comcast PC Investments Inc. ("Comcast PC") is a wholly owned subsidiary of Comcast Online and an

indirect wholly-owned subsidiary of Comcast Corporation, and is a company organized and existing under the laws of the State of Delaware. Comcast PC's principal place of business is located at 1201 North Market Street, Wilmington, Delaware. As of March 28, 2000, Comcast PC had legal and beneficial ownership of 29,114,600 shares of At Home Series A common stock, representing 8.3% of the outstanding shares of At Home Series A common stock (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, Comcast PC beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Cox entities.

16. Defendant Brian L. Roberts ("Roberts") is and at all relevant times herein was President and a director of Comcast Corporation. From August 1996 through August 28, 2000, Roberts was Comcast's designee on the At Home Board of Directors (the "At Home Board" or the "Board") and, as an At Home director, owed fiduciary duties to At Home.

17. Defendant David M. Woodrow was Executive Vice President of Business Development with Cox Communications Inc. at all relevant times alleged herein. From August 1996 through August 28, 2000, Woodrow was Cox's designee on the At Home Board and, as an At Home director, owed fiduciary duties to At Home.

FACTUAL ALLEGATIONS

A. Formation of At Home and the Master Distribution Agreements

18. Tele-Communications, Inc. ("TCI") and others incorporated At Home in Delaware in March 1995. At Home was founded on the premise that cable infrastructure could provide the fastest, most cost-effective delivery mechanism for Internet services. At Home's cable media service not only

was supposed to provide data transmission over 100 times faster than a telephonic dial-up modem but the system was "always on," providing a customer with instantaneous access to the internet and eliminating the time consuming dial-up procedure required by a telephone connection.

19. At Home's controlling shareholders, TCI, Cox and Comcast, invested in At Home for the purpose of developing this high-speed Internet service with debt that would appear on At Home's balance sheet, but not on the controlling cable companies' balance sheets. The controlling cable companies raised capital to develop cable modem technology through the sale of At Home stock and bonds to the public, but they retained control over At Home's Board.

20. At Home provided high-speed Internet access to the cable companies' customers pursuant to Master Distribution Agreements ("MDAs"). The original MDAs were entered into in June 1996 by At Home with Cox, Comcast and TCI. Under the MDAs, At Home received a share of subscription revenues paid by the cable company subscribers to the cable companies for high speed Internet access provided by At Home. At Home generally received 35% of the fees paid by the subscribers to the cable companies in the United States. This split in revenue, which was highly unfavorable to At Home, was dictated by the controlling cable companies, including defendants Cox and Comcast.

21. The MDAs were unfair and disadvantageous to At Home for numerous reasons. The MDAs allowed Cox, Comcast and the other cable companies—and not At Home—to control the customer relationship and the flow of revenue from the customer. For example, if the cable companies offered any discounts or promotions, At Home lost its share of revenue that would have been collected. Thus, if Cox or Comcast offered a new subscriber three months free high speed Internet access on the At Home system in order to induce that customer to purchase other cable services, At

Home literally received no revenue from that customer for three months even though it had to absorb the capital cost of adding the customer to the system. Moreover, At Home could not raise prices to consumers even though At Home's product was underpriced in the marketplace. Pricing decisions were controlled by Cox, Comcast and the other cable companies who controlled At Home.

22. In addition, as noted above, the revenue split of 65% to the cable companies and 35% to At Home was uneconomical and unfair to At Home. After discounts are factored in, At Home typically received about $10-$15 per month per subscriber under the unfair MDAs. At this rate, At Home's cost to build out its system per subscriber exceeded its revenue per cable company subscriber. Given the backwards economics imposed on At Home by the controlling cable companies pursuant to the MDAs, At Home experienced a deteriorating financial condition even as it successfully added subscribers from approximately 26,000 in 1997 to approximately 4 million when it filed for bankruptcy in September of 2001.

23. Simply put, the one-sided MDAs ensured that At Home bore the brunt of building out its high speed Internet access system while Cox, Comcast and the other cable companies reaped the rewards.

B. Cox's and Comcast's Investment In At Home

24. Cox and Comcast acquired identical equity stakes in At Home on the same day for the exact same price.

25. On June 4, 1996, Comcast PC and Cox@Home entered into a letter agreement and term sheet with At Home whereby each would acquire 727,865 shares of At Home preferred stock for $10 per share (for a total cost of $7,278,650). The purchases contemplated by the letter agreement took place on August 1, 1996, when those same Cox and Comcast subsidiaries jointly entered into a Stock

Purchase and Exchange Agreement with At Home and the other At Home equity holders, TCI and Kleiner, Perkins, Caufield and Byers VII Associates ("KPCB") and certain of their affiliates. Pursuant to that purchase agreement, Cox purchased 727,865 shares of At Home Series AX preferred stock and Comcast purchased 727,865 shares of At Home Series AM preferred stock. Cox's and Comcast's preferred stock was convertible into At Home Series A common stock ("At Home common stock").

26. In connection with their acquisition of At Home preferred stock, Cox and Comcast entered into the MDAs (discussed above) and a stockholders agreement with TCI, KPCB and certain of their affiliates.

27. By December 1996, both Cox and Comcast began offering At Home's high speed Internet access to service some of their residential customers.

C. At Home's IPO

28. In July of 1997, At Home completed its initial public offering ("IPO"). At Home issued 10,350,000 shares of At Home common stock to the public at $10.50 per share. At Home received net proceeds of approximately $99.8 million.

29. At the time of the IPO, all of Cox's and Comcast's preferred stock was converted into At Home common stock on a 20 for 1 basis. As a result of the IPO, Cox became the beneficial owner of 14,557,300 shares of At Home common stock, representing 16.46% of the outstanding At Home common stock. Comcast also became the beneficial owner of 14,557,300 shares of the outstanding At Home common stock. Cox and Comcast's ownership percentage was subsequently diluted somewhat, to the levels alleged in paragraphs 11-15, by, inter alia, the issuance of stock in connection with the Company's acquisitions, such as the acquisition of Excite, Inc.

30. In addition to the publicly traded At Home common stock (Series A); the Company also issued Series B common stock, which carried 10 votes per share. TCI owned all of the Series B common stock and thus, after the IPO, it controlled in excess of 70% of the voting power of At Home stock.

31. Both before and after the IPO, the Company's controlling stockholders were TCI, Cox and Comcast, all of which were parties to stockholders agreements that provided for this joint control. At the same time as the IPO, on or about July 16, 1997, At Home, Cox, Comcast, TCI and KPCB entered into an Amended and Restated Stockholders' Agreement (the "Stockholders' Agreement").

D. The Stockholders Agreement

32. Although Cox and Comcast had always acted jointly in purchasing and holding their At Home equity, the Stockholders' Agreement contractually joined Cox and Comcast into a stockholder group with each other and with other stockholder signatories, including TCI. The Agreement controlled how Cox, Comcast and the other signatories would acquire, hold, vote and dispose of their shares of At Home common stock.

33. For example, the Stockholders' Agreement contains an agreement between Cox, Comcast and the other signatories requiring them to vote all their At Home common stock in favor of any action required by the Stockholders' Agreement, including the election of At Home's Chief Executive Officer to the At Home board of directors. Cox and Comcast agreed with TCI that as long as Cox and Comcast each had 5,000,000 shares of At Home common stock (2,500,000 before a June 1999 stock split), they each had the right to select one Series B director to At Home's Board. TCI had the right to elect 3 of the other 5 Series B directors. At that time, all actions by the Company's Board had to be approved by a majority of the Series B directors. Thus, TCI, Cox and Comcast controlled the At Home Board.

34. Pursuant to the Stockholders' Agreement, from 1996 through August 28, 2000 (when they simultaneously resigned from the Board), Comcast appointed Brian L. Roberts (the President of Comcast Corporation) and Cox appointed David M. Woodrow (a Senior Vice President of CCI) to the Board as Series B directors.

35. Cox and Comcast also agreed to certain restrictions concerning their sales or other dispositions of At Home common stock. The Stockholders' Agreement prohibited the transfer of At Home securities, unless expressly permitted by the terms of the Stockholders' Agreement. Additionally, Cox and Comcast agreed to rights of "first offer" with respect to dispositions of At Home securities—that is, both Cox and Comcast were permitted to sell their At Home common stock in the public market only after they first offered it to each other and to the other cable companies that were parties to the Stockholders' Agreement. Cox and Comcast also had a pre-emptive right to acquire At Home common stock to maintain their proportional ownership for all transactions involving any new issuance of common stock by At Home.

36. Cox and Comcast also agreed with each other and with the other parties to the Stockholders' Agreement to what are commonly known as "Tag-Along" and "Drag-Along" rights in connection with certain transactions involving At Home common stock. The "Tag-Along" right gave Cox and Comcast the right to participate if there was a proposed sale of a control block of At Home shares by TCI (subsequently AT&T). The "Drag-Along" could be used to require Cox or Comcast to sell a pro rata portion of their At Home securities to a third party if AT&T and any two other parties to the Stockholders' Agreement proposed a certain type of control block sale to that third party.

E. AT&T Acquires TCI and Gives Cox and Comcast "Blocking" Power Over Board Actions

37. On June 23, 1998, AT&T signed an agreement to acquire TCI and that transaction was completed later that year. As a result of its acquisition of TCI, AT&T also acquired and succeeded to TCI's equity interest in At Home.

38. Cox and Comcast had the right to terminate their obligation, under the MDAs, to have At Home be the only provider of high speed internet access if, by June 4, 1999, AT&T and its affiliates had not brought to At Home a certain number of high speed internet customers. (This "Exclusivity Obligation" required Cox and Comcast to offer its cable customers high speed Internet access exclusively through the At Home access system pursuant to the MDAs.)

39. AT&T failed to meet this requirement. To induce one or both of Cox and/or Comcast not to terminate the Exclusivity Obligation, AT&T agreed to amend At Home's Certificate of Incorporation to provide that any board action required the vote of 4 of the 5 Series B directors. As two of the five Series B directors were appointed by Cox and Comcast, the Cox/Comcast directors, voting together, had the ability to block any proposed Board action, including action sought by AT&T which, at that time, controlled over 70% of the voting power of At Home's shareholders. Acting together, AT&T, Cox and Comcast had full control of At Home's Board.

40. Apparently, AT&T's inability to exercise sole, complete control over the At Home Board led AT&T, Cox and Comcast in March 2000 to enter into a series of convoluted agreements which transferred complete control over the At Home Board to AT&T and provided, at the same time, a lucrative "exit strategy" for Cox and Comcast from their At Home investment and contractual arrangements.

F. The March 2000 Transactions

41. On March 28, 2000, AT&T, Cox and Comcast, through their domination of At Home and their representatives on the At Home Board, caused the Company to enter into a series of interconnected and intricate agreements that greatly benefited each of the controlling shareholders at the expense of At Home. Pursuant to the March 2000 Transactions, (a) AT&T gained complete control of At Home's Board (and did not relinquish that control until well after the filing of At Home's bankruptcy proceeding); (b) Cox and Comcast (acting together and procuring the exact same deal) gained, among other things, the ability to "put" their At Home shares to AT&T which ultimately allowed them to realize more than $3 billion, and certain rights to break their contractual arrangements to use At Home's high speed Internet access service (and to do so with help from At Home); and (c) the controlling shareholders forced At Home to perpetuate the uneconomical MDAs that gave AT&T, Cox and Comcast an unfair split of the revenue generated from customers of the At Home service (the same contracts that the Bankruptcy Court later found to be uneconomical in upholding At Home's "rejection" of the contracts).

42. In essence, Cox and Comcast jointly determined that if they were to cede control over At Home's Board of Directors to AT&T, then they did not want to be bound to an At Home controlled by AT&T—their arch rival in the cable business. In order for AT&T to take complete control of At Home and for Cox and Comcast to reap hundreds of millions in profits, AT&T, Cox and Comcast caused At Home to give up critical leverage with Cox and Comcast which allowed them to revoke their Exclusivity Obligations, terminate their MDAs and even to obtain certain assistance from At Home in transitioning customers off the At Home network when Cox and Comcast terminated the MDAs.

43. Specifically, the March 2000 Transactions entered into on March 28, 2000 encompassed a number of interrelated agreements, including: (1) a "covering" agreement which referenced and attached various term sheets; (ii) "put" rights granted by AT&T to Cox and Comcast (the "Puts"), and a joint agreement by Cox and Comcast to waive most (but not all) of their rights under the Stockholders' Agreement; (iii) a new MDA between AT&T and At Home that perpetuated the same unfair economics of the previous MDA; (iv) an agreement to seek to obtain stockholder approval to amend At Home's Certificate of Incorporation to eliminate all supermajority and unanimous voting requirements and to give AT&T complete control over At Home's Board; and (v) a new MDA between Cox and Comcast and At Home (with the same uneconomical terms as the new MDA with AT&T) which gave Cox and Comcast warrants to purchase in excess of 44 million shares of At Home common stock. The new MDA referred to Cox and Comcast as a single entity "Cox/Comcast" throughout the agreement and provided both Cox and Comcast with essentially identical rights and obligations.

44. The $2.9 Billion "Put": Pursuant to the terms of the Puts, AT&T granted Cox and Comcast the right to sell to AT&T their At Home common stock for up to $1,397,500,800 (in the case of Cox) and $1,500,152,640 (in the case of Comcast)—a total of nearly $2.9 billion. But this was no run of the mill "put." Although the total amount to be paid by AT&T was set, two critical components of any put transaction remained completely up in the air: (1) the price per share and (2) the number of shares subject to the put.

45. Pursuant to the Puts, at any time from January 1, 2001 through June 4, 2002, Cox and Comcast could elect to exchange At Home shares for cash (or AT&T stock) at a per share sale price equal to the higher of (1) $48 per share or (2) the average per share trading price of At Home common stock during the thirty (30) consecutive trading day period

beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of notice of the exercise of the Puts. If the per share price was $48 per share, then the total consideration AT&T had agreed to pay would result in Cox and Comcast effectively selling all of the At Home common stock they owned ($2.897 billion ÷ $48 per share = 60,367,780 shares, which slightly exceeded the total shares which Cox and Comcast reported owning as of March 28, 2000). But, if the per share price exceeded $48 per share as a result of a continued rise in the price of At Home common stock, Cox and Comcast would receive the same payment from AT&T ($2.9 billion) and would also retain some number of At Home common stock, thus increasing the overall value or consideration of the transaction. For example, if the per share price doubled from $48 to $96 per share, a not uncommon phenomenon in the heady days of the Internet stock boom, Cox and Comcast would have received the $2.9 billion from AT&T for half of their At Home shares ($2.897 billion ÷ $96 per share = 30,183,890 shares), and would have retained in excess of 30 million shares worth an additional $2.9 billion. Thus, while the aggregate value of the At Home stock AT&T would be required to purchase was $2.9 billion, the total consideration to be realized by Cox and Comcast would easily exceed $2.9 billion if the price per share rose above $48 per share.

46. The Stockholders' Agreement: As part of the March 2000 Transactions, Cox and Comcast jointly agreed to waive most (but not all) of their rights under the Stockholders' Agreement. Cox and Comcast gave up their right to cause AT&T to vote its shares in favor of the election of a Cox designee and a Comcast designee as Series B members of the At Home Board. The March 2000 Transactions did not however, cancel or terminate the Stockholders' Agreement, and all the parties to the Transactions agreed to vote all their shares of voting stock in favor of the amendment to At Home's Certificate of Incorporation. Subsequent to the March

2000 Transactions, Cox and Comcast remained as parties to the Stockholders' Agreement and retained valuable rights under that Agreement including their "Tag-Along" rights, in the event of a sale of At Home.

47. The March 2000 Transactions effectively destroyed any long-term value of At Home by permitting Cox and Comcast, who together accounted for a substantial portion of the cable customers using At Home's high speed Internet access service, to escape their Exclusivity Obligations with At Home while providing Cox and Comcast with certain rights which would make their transition off the At Home system easier. Indeed, as part of the March 2000 Transactions, At Home agreed to enter into a "Transition and Service Level Plan" with Cox and Comcast which would provide for an "exit plan" for Cox and Comcast to unwind their relationship with At Home in the event they terminated the MDA. As part of a Cox and Comcast exit plan, At Home agreed to sell, at bargain-basement prices, certain critical hardware and proprietary software to Cox and Comcast which was necessary for Cox and Comcast to provide high speed Internet access to their customers.

48. In addition, as part of the March 2000 transactions, AT&T, Cox and Comcast, caused At Home to allow AT&T to exchange its Series A common stock (which had one vote per share) for Series B common stock (which had 10 votes per share). As a result, AT&T was permitted to obtain 450 million more votes, increasing its voting power over At Home's voting shares from approximately 55% to over 70%, without paying adequate or fair consideration to At Home.

49. Although certain of the March 2000 Transactions were purportedly subject to the effectiveness of the amendment of the At Home Certificate of Incorporation, which would include shareholder approval, such approval was a mere formality since AT&T, Cox and Comcast, who, at that time, together controlled more than 63% of At Home's voting

stock, had jointly agreed to vote their stock to approve the March 2000 Transactions.

50. The March 2000 Transactions were not conditioned on approval by a majority of the public shareholders. Nor were the Transactions conditioned on the negotiation and approval of a properly functioning independent special committee of directors.

G. Comcast Obtains Additional At Home Securities

51. In January, March and August of 2000 (separate and apart from the March 2000 Transactions and the At Home warrants obtained therein), Comcast acquired warrants to purchase approximately 8.9 million additional shares of At Home common stock through its acquisition of the cable systems of Prime Communications-Potomac, LLC, Prime Communications-Chicago LLC. (on or about August 1, 2000); Jones Intercable, Inc. (on or about March 2, 2000) and Garden State Cablevision L.P (on or about January 18, 2000). (These cable companies had previously acquired warrants for At Home common stock.)

H. Cox and Comcast Jointly Fix the Price for the Puts and the Number of At Home Shares Subject to the Puts

52. The Puts held by Cox and Comcast first became capable of having the critical terms of the Puts fixed on January 1, 2001. Ten days later—on January 11, 2001—Cox and Comcast each sent a written letter, in substantially the same form, notifying AT&T that they were selling their At Home shares to AT&T pursuant to the Puts. Specifically, CCI notified AT&T of its election to sell all the At Home common stock, owned directly or indirectly by it or Cox@Home, to AT&T. Comcast Corporation notified AT&T of its election to sell 31,253,180 shares of At Home common stock (which was all of the shares it admitted owning) to AT&T. Cox and Comcast both demanded that consideration be paid by AT&T in the form of shares of AT&T common stock.

53. On January 11, 2001, At Home common stock closed at $7.72 per share.

54. Pursuant to the terms of the Puts, the per share sale price and the number of shares to be purchased by AT&T could not be determined until the fifteenth trading day following AT&T's receipt of such notice—February 2, 2001. At Home common stock, on February 2, 2001, closed at $6.00 per share. The average closing price for At Home securities for the 30 trading-day period preceding and following the January 11th notice was less than $48 per share, so the sale price for the Puts was then locked in at $48 per share pursuant to the hybrid pricing mechanism of the Puts. At that sale price ($2.897 billion ÷ $48 per share) Cox and Comcast could sell 60,367,780 shares of At Home common stock to AT&T.

I. Cancellation Of The Puts

55. Because the Puts, as originally structured, would have subjected AT&T to enormous tax liabilities, AT&T negotiated with both Cox and Comcast to cancel the Puts. This "cancellation" yielded an extra $700 million windfall to Cox and Comcast.

56. Specifically, on or about May 18, 2001, Cox and Comcast each entered into share issuance agreements with AT&T whereby Cox and Comcast: (1) cancelled the Puts, (2) agreed to retain their shares of At Home common stock (worth $237 million) rather than force AT&T to purchase them, and (3) received 155.3 million shares of AT&T common stock, approximately 21 million more shares (worth approximately $470 million) than required under the January 11th notices. Cox received approximately 75 million shares of AT&T stock, and Comcast received approximately 80.3 million AT&T shares. The total value of 155.3 million shares of AT&T common stock, at its closing price on May 18, 2001, was approximately $3.43 billion.

57. Comcast recorded a pre-tax gain of $296.3 million and Cox recorded and announced a pre-tax gain of $307.4 million as a result of the cancellation of the Puts. In fact, their short swing profits may have far exceeded these amounts.

J. Cox/Comcast Terminate The MDA

58. On June 1, 2001, Comcast and Cox each entered into agreements with At Home to extend the deadline for giving notice to At Home of their intent to terminate the Exclusivity Obligations of the MDA to June 18, 2001.

59. On June 18, 2001, Cox and Comcast, shortly after reaping enormous short-swing profits from the Puts, provided notice to At Home of their intent to terminate the Exclusivity Obligations of the MDA effective on December 4, 2001.

60. On August 28, 2001, Cox and Comcast provided notices of their intent to terminate the MDA with At Home.

COX AND COMCAST ACTED AS A "GROUP" UNDER THE FEDERAL SECURITIES LAWS

61. At all relevant times, Cox and Comcast acted jointly in acquiring, holding, voting or disposing of At Home securities so as to be considered a "group" under Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d). To summarize:

- Comcast and Cox, through wholly owned subsidiaries, entered into an agreement with At Home on June 4, 1996 to purchase preferred shares of At Home, and on August 1, 1996 each entity purchased the same amount of stock for the same price.
- Cox and Comcast entered into the Stockholders' Agreement which contained, inter alia: (i) agreements by each party to vote all its shares in favor of certain matters; (ii) the right by Cox and Comcast each to designate one Series B director to the At Home Board; (iii) rights to acquire At Home common stock to

maintain proportional ownership; (iv) restrictions on disposing of common stock as well as rights of first offer; and (v) rights to sell shares together or to force another to sell shares in certain transactions. Although Cox and Comcast waived certain rights under the Stockholders' Agreement pursuant to the March 2000 Transactions, the Stockholders' Agreement remained in effect at all relevant times, including when Cox and Comcast reaped their "short swing" profits from the cancellation of the Puts.

- When AT&T acquired TCI's interest in At Home, Cox agreed with AT&T not to terminate the Exclusivity Obligations and extracted from AT&T an agreement to change the Company's governance so that, acting jointly, Cox and Comcast had veto power over any Board action.

- On March 28, 2000, CCI and Comcast Corporation, on behalf of themselves and their wholly owned subsidiaries, jointly negotiated and entered into a new MDA with At Home, whereby Cox and Comcast acquired warrants to purchase in excess of 44 million shares of At Home common stock and such agreement provided Cox and Comcast with identical rights and, in fact, refers to "Cox/Comcast" throughout the agreement.

- Cox and Comcast jointly and collectively agreed to the terms of the March 2000 Transactions (including terms concerning the disposition of their At Home common stock) and such terms were virtually identical for both Cox and Comcast. In connection with the Puts, Cox and Comcast jointly agreed to waive the exact same provisions of the Stockholders' Agreement (concerning the election of two directors to At Home's Board) and thereby agreed to relinquish their shared veto power over At Home Board action.

- On March 28, 2000, Cox and Comcast agreed to vote all of their At Home shares in favor of the March 2000 Transactions.
- On August 28, 2000, Cox's and Comcast's designees to At Home's Board simultaneously resigned their positions.
- On January 11, 2001, both Cox and Comcast provided notice to AT&T of the exercise of their Puts and both requested AT&T stock as consideration instead of cash.
- On or about May 18, 2001, Cox and Comcast agreed to cancel the Puts, while both retained their At Home common stock, and entered into Share Issuance Agreements with AT&T whereby they each received tens of millions of shares of AT&T common stock.
- On June 1, 2001, Cox and Comcast each entered into identical agreements with At Home to extend the deadline for giving notice to At Home of their intent to terminate the Exclusivity Obligations of the MDA.
- On June 18, 2001 Cox and Comcast both notified At Home of their intent to terminate the Exclusivity Obligations of the MDA effective December 4, 2001.

62. All of the above actions by Cox and Comcast did not "coincidentally" occur on the same date and to the same effect; rather, Cox and Comcast, as beneficial owners of At Home common stock, at all times acted in concert with respect to the acquisition, holding, voting or disposition of their At Home securities.

63. As a direct result of the concerted course of conduct by Cox and Comcast, At Home's senior officers who dealt with Cox and Comcast correctly perceived that Cox and Comcast acted "as one" and were pursuing the same course of conduct vis-a-vis their beneficial ownership of shares in At Home.

FIRST CAUSE OF ACTION
(Violation of Section 16(b) of the Exchange Act
Against the Cox and Comcast Defendants)

64. Plaintiff repeats and realleges paragraphs 1 through 63 as if fully set forth herein.

65. At Home's Series A common stock was registered pursuant to Section 12(g) of the Exchange Act (15 U.S.C. § 781) and constituted an "equity security" for the purposes of Section 16 of the Exchange Act.

66. Section 16(b) of the Exchange Act prohibits the "beneficial owner" of more than ten percent (10%) of a class of securities registered under § 12 of the Exchange Act, or a director of an issuer of such a § 12 security, from profiting from any sale and purchase or purchase and sale of such securities within a six month period.

67. In determining who is a "beneficial owner" of more than 10 percent of a class of equity securities, Rule 16a-1(a)(1) (17 C.F.R. § 240.16-1(a)(1)) adopts the definition provided by Section 13(d) of the Exchange Act and rules adopted thereunder. Section 13(d)(3) states that, "[w]hen two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such . . . group shall be deemed a 'person' for the purposes of this subsection." 15 § 78m (d)(3) (emphasis supplied). To implement Section 13(d)(3), Rule 13d-5 defines beneficial ownership by a "group" as follows: "when two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and (g) of the [Exchange] Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons." 17 C.F.R. § 240.13d-5(b)(1) (emphasis supplied).

68. As alleged above, defendants Cox and Comcast at all times were members of a Section 13(d)(3) group with respect to acquiring, holding, voting or disposition of the At Home common stock beneficially owned by the Cox and Comcast entities, and as members of a 13(d) group, each of Cox and Comcast beneficially owned the shares beneficially owned by the other. At all times from July 1997 until July 2001, Cox and Comcast were each the beneficial owner of more than 10% of At Home's Series A common stock and, therefore, each was subject to the strict liability provisions of Section 16(b) concerning short swing profits.

69. The January 11, 2001 notices triggered the 30 day pricing period for the Puts and such period concluded on February 2, 2001. As of February 2, 2001, the number of shares subject to the Puts and the price per share became fixed, and AT&T had a binding obligation to buy such shares at the determined price. For Section 16(b) purposes, this was equivalent to a "sale" by Cox and Comcast of the underlying At Home common stock. Cox and Comcast continued to retain their beneficial ownership of more than 10% of At Home's Series A common stock pending the closing of the "sale" transaction.

70. Cox's and Comcast's May 18, 2001 cancellation of the Puts occurred within six months of the February 2, 2001 fixing of the Puts' per share price and the shares subject to the Puts, at a time when Cox and Comcast continued to beneficially own more than 10% of At Home's Series A common stock. For Section 16(b) purposes, the cancellation of the Puts was the equivalent of a "purchase" by Cox and Comcast.

71. Pursuant to Section 16(b), Cox and Comcast engaged in a matched "sale" and "purchase" within six months when Cox and Comcast were statutory insiders by virtue of their beneficial ownership of more than 10% of At Home's Series A common stock. At Home is entitled to receive at least the

$600 million of pre-tax profit Cox and Comcast publicly claimed to have realized from these transactions.

72. In fact, Cox and Comcast received almost $3.7 billion from the cancellation of the Puts: (a) $3.43 billion of AT&T stock (valued as of May 18, 2001) and (b) $237.9 million of At Home common stock (valued as of May 18, 2001). Thus, it is likely that Cox and Comcast's short swing profits far exceed the $600 million they reported.

SECOND CAUSE OF ACTION
(Violation of Section 16(b) of the Exchange Act against the Comcast Defendants)

73. Plaintiff repeats and realleges paragraphs 1-63, and 65-68 as if fully set forth herein.

74. In the alternative, if the Puts were otherwise deemed a "sale" under Section 16(b) on March 28, 2000, then such "sale" by Cox and Comcast of At Home common stock, may be matched with Comcast's acquisitions of warrants to purchase 8.9 million shares of At Home common stock through its acquisitions of Garden State Cablevision L.P., Jones Intercable Inc., Prime Communications—Potomac LLC and Prime Communications—Chicago LLC. The acquisitions of warrants are deemed "purchases" under Section 16(b).

75. The "sales" and "purchases" described above occurred when Comcast beneficially owned more than 10% of the outstanding Series A common stock of At Home and when it was also a statutory insider by virtue of its appointment of defendant Roberts to At Home's Board of Directors.

76. As a result of the acquisition of the Puts and 8.9 million warrants within six months of each other, Comcast earned short swing profits in violation of Section 16(b) in an amount to be determined.

THIRD CAUSE OF ACTION
(breach of fiduciary duties
Against all Defendants)

77. Plaintiff repeats and realleges paragraphs 1-63 as if fully set forth herein.

78. Defendants Roberts and Woodrow, as At Home directors, owed fiduciary duties to At Home to exercise the utmost good faith, to act with due care and with absolute loyalty to At Home.

79. At all times, Cox and Comcast controlled the actions of their designees on the At Home Board of Directors (Roberts and Woodrow) and are liable for any breaches of fiduciary duty committed by Roberts and Woodrow during their tenure as At Home directors.

80. Roberts and Woodrow breached their fiduciary duties by the acts described above, including:

(a) causing At Home to enter into the lopsided, unfair and self-dealing March 2000 Transactions which were not "entirely fair" to At Home, and which enriched Cox and Comcast at the expense of At Home;

(b) perpetuating unfair and uneconomical MDAs which benefited Cox and Comcast (and the other controlling shareholder, AT&T) at the expense of At Home; and

(c) providing Cox and Comcast the ability to terminate both their relationship and/or their exclusivity with At Home, mandating that At Home provide certain transition support to Cox and Comcast so as to ease the transition of Cox and Comcast to a competing system, and permitting Cox and Comcast to purchase certain critical At Home assets for unfair prices.

81. In addition, Cox and Comcast owed fiduciary duties to At Home as controlling shareholders because (a) they were part of the controlling shareholders' group, along with AT&T

and (b) because they had the ability through their two designees on the At Home board to block any board action.

82. Because Cox and Comcast were controlling shareholders of At Home in March 2000, they and their director designees on the At Home Board had an obligation to ensure that the March 2000 Transactions, including the terms of the MDAs executed in connection therewith, were "entirely fair" to At Home. The March 2000 Transactions were structured so that At Home received inadequate consideration while Cox and Comcast reaped extraordinary benefits.

83. As a direct, proximate and foreseeable result of the defendants' breaches of fiduciary duties and obligations owed to At Home, defendants have jointly and severally damaged At Home in an amount to be determined at trial.

84. In addition, the actions of defendants were willful, wanton, malicious and oppressive and thus plaintiff is entitled to exemplary and punitive damages appropriate to punish and make an example of all of the defendants.

WHEREFORE, plaintiff prays for judgment against defendants Cox and Comcast, Roberts and Woodrow and for damages for the violations of Section 16(b) of the Exchange Act of at least $600 million, and damages for the claims for breach of fiduciary duties in an amount to be determined at trial, as well as attorneys' fees, prejudgment interest, post judgment interest and such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury for all issues in this action.

Dated: September 23, 2002

THE BAYARD FIRM

By: /s/ Edmond D. Johnson
EDMOND D. JOHNSON (No. 2257)
Michael L. Vild (No. 3042)
222 Delaware Avenue, Suite 900
P.O. Box 25130
Wilmington, Delaware 19899
(302) 655-5000

OF COUNSEL:

Joseph S. Allerhand
Richard W. Slack
Daniel S. Cahill
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
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Attorneys for Plaintiff At Home Corporation,
by the Official Committee of Unsecured Bondholders

APPENDIX H

EXHIBIT B

AT HOME CORPORATION
425 Broadway Street
Redwood City, CA 94603

March 28, 2000

AT&T Corp.
Comcast Corporation
Cox Communications, Inc.

Ladies and Gentlemen:

Reference is hereby made to the term sheets attached hereto as Annexes A, B and C (the "Term Sheets") regarding certain agreements among At Home Corporation ("Excite@ Home"), AT&T Corp. ("AT&T"), Comcast Corporation ("Comcast"), Cox Communications, Inc. ("Cox") and certain of their respective subsidiaries (collectively, the "Parties").

1. The Term Sheets set forth the agreements of the Parties in respect of the transactions contemplated hereby and thereby. The Parties intend that the covenants and agreements set forth in the Term Sheets will be superseded by definitive agreements and instruments or definitive waivers or amendments of existing instruments, which will contain provisions incorporating and expanding upon the agreements set forth in the Term Sheets, together with provisions customary in the case of transactions of the type described herein and therein, and such other provisions as are reasonable and appropriate in the context of the transactions contemplated hereby and thereby. The foregoing notwithstanding, the Parties expressly acknowledge and agree that this Letter Agreement (including the Term Sheets) constitutes a binding agreement among them, subject to the terms and conditions set forth in this Letter Agreement and the Term Sheets, until definitive documentation is executed and delivered (except that the effec-

tiveness and enforceability of the provisions of the Term Sheets is subject to certain conditions set forth in paragraph 3 below). If definitive documentation is not executed and delivered with respect to any matter contained in the Term Sheets within 90 days from the date of this Letter Agreement, then this Letter Agreement and the relevant provisions of the Term Sheets shall be deemed to be such definitive documentation with respect to such matter, commencing on the date hereof (subject to paragraph 3 below). Each party hereto agrees to act in good faith and to use all reasonable efforts to consummate the transactions contemplated by this Letter Agreement and the Term Sheets, and to complete the related definitive agreements, waivers or amendments; *provided* that the foregoing will not require Cox or Comcast to incur any cost or detriment in connection with satisfaction of the condition set forth in paragraph 3(c) below.

2. (a) As promptly as practicable after the date hereof, Excite@Home shall take all such action as may be necessary, including seeking all requisite stockholder approvals under applicable law and the Restated Certificate of Incorporation of Excite@Home (the "Charter"), to cause the Charter to be amended (collectively, the "Charter Amendment") as provided in Section 3(a) of Annex B.

(b) Each Party hereto agrees to take all steps necessary to implement the Charter Amendment and any other action provided for in the Term Sheets that under applicable law or the Charter requires action of or approval by the stockholders of Excite@Home (each, an "Approval Item"), including, without limitation, voting at any meeting of stockholders all shares of Voting Stock (as defined in the Amended and Restated Stockholders' Agreement, dated as of July 16, 1997, as amended by the letter agreements dated October 2, 1997 and October 10, 1997 (the "Stockholders Agreement"), among Excite@Home and the stockholder signatories thereto) held by it or any member of its Stockholder Group (as defined in the Stockholders Agreement) in favor of such

Charter Amendment (and any other Approval Item) and/or executing or causing to be executed, as promptly as practicable, a consent in writing to the Charter Amendment (and any other Approval Item).

3. The effectiveness of all the provisions of the Term Sheets (and any definitive documentation related thereto) shall be subject to (a) effectiveness of the Charter Amendment, (b) receipt of any required approval of the Nasdaq Stock Market, Inc. or an alternative national securities exchange, including with respect to the extra voting power attached to shares of Series B Common Stock to be issued pursuant to Annex B (including pursuant to the warrants contemplated by Annex B), and (c) receipt of any other consents, approvals and waivers as may be necessary to consummate the transactions contemplated by the Term Sheets in a manner that results in the economic effects contemplated thereby.

4. If the Effective Date shall not have occurred on or prior to September 30, 2000, then any Party hereto (other than any Party whose failure to comply with its obligations hereunder shall have caused such failure to occur) may terminate this Letter Agreement by sending written notice to each of the other Parties (a "Termination"). Following any such Termination, this Letter Agreement (including the Term Sheets) shall be null and void and of no further force or effect.

5. Each Party hereto severally represents to each of the other parties hereto that this Letter Agreement (including the Term Sheets) has been duly authorized, executed and delivered by such Party and constitutes the legal, valid and binding obligation of such Party and, to the extent applicable, the members of such Party's Stockholder Group, enforceable against such Party and the applicable members of its Stockholder Group, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium

and similar laws affecting the rights of creditors generally and by general principles of equity.

6. Each of AT&T, Comcast and Cox acknowledges and agrees that its execution of this Letter Agreement shall constitute the consent of their respective Stockholder Affiliates listed in Schedule I hereto to the transactions contemplated by this Letter Agreement and the Term Sheets and each of them agrees to use all reasonable efforts to cause their respective subsidiaries and affiliates, including the Stockholder Affiliates, to comply with the provisions, terms and obligations applicable to them as set forth in this Letter Agreement and the Term Sheets. Each Party also agrees to waive, and cause its applicable subsidiaries and affiliates to waive, any most favored nations provisions to which they might otherwise be entitled with respect to such arrangements as may be entered into by Excite@Home in connection with satisfaction of the conditions to the effectiveness of the Term Sheets.

This Letter Agreement (including the Term Sheets) shall be governed by, and construed in accordance with, the laws of the State of Delaware, without regard to the conflicts of law rules of such state. The Parties hereto agree that irreparable damage would occur in the event any provision of the Letter Agreement or the Term Sheet was not performed in accordance with the terms hereof or thereof, and that the Parties shall be entitled to specific performance (subject to the moving party sustaining the applicable burden necessary to obtain such relief including as to the inadequacy of money damages) of the terms hereof and thereof in addition to any other remedy at law or in equity.

This Letter Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. This Letter Agreement shall not be effective as to any Party until executed and delivered by all of the Parties.

[Remainder of Page Intentionally Left Blank]

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

AT HOME CORPORATION

By: /s/ Thomas A. Jermoluk
Name: THOMAS A. JERMOLUK
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By:_____
Name:
Title:

COMCAST CORPORATION

By:_____
Name:
Title:

COX COMMUNICATIONS, INC.

By:_____
Name:
Title:

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

AT HOME CORPORATION

By: /s/ _____
Name: Thomas A. Jermoluk
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By: /s/ John C. Petrillo
Name: JOHN C. PETRILLO
Title: EVP – CS & BD

COMCAST CORPORATION

By: _____
Name:
Title:

COX COMMUNICATIONS, INC.

By: _____
Name:
Title:

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

AT HOME CORPORATION

By: /s/ _____
Name: Thomas A. Jermoluk
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By: _____
Name:
Title:

COMCAST CORPORATION

By: /s/ Robert S. Pick
Name:
Title:

COX COMMUNICATIONS, INC.

By: _____
Name:
Title:

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

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Name: Thomas A. Jermoluk
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By: _____
Name:
Title:

COMCAST CORPORATION

By: _____
Name:
Title:

COX COMMUNICATIONS, INC.

By: /s/ David M. Woodrow
Name: DAVID M. WOODROW
Title: EVP

SCHEDULE I
STOCKHOLDER AFFILIATES

AT&T
AT&T Broadband, LLC
TCI Internet Services, Inc.
TCI Communications, Inc.
TCI Cable Investments Inc.
TCI.NET, Inc.

Comcast
Comcast Cable Communications, Inc.
Comcast Online Communications, Inc.

Cox
Cox Enterprises, Inc.

Annex A

Term Sheet among AT&T, Comcast, Cox and Excite@Home

(Certain capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Letter Agreement, dated March 28, 2000, to which this term sheet is attached).

1. Put Right

(a) AT&T grants to each of Cox and Comcast the right to put to AT&T or a subsidiary designated by AT&T (the "Put"), exercisable at any time or from time to time from January 1, 2001 through June 4, 2002, up to an aggregate number of shares of Excite@Home Series A common stock ("Series A Shares") currently owned by Cox or Comcast or their respective subsidiaries, as the case may be, equal to the Maximum Number. For this purpose, the "Maximum Number" with respect to Cox will be a number of Series A Shares having an aggregate purchase price under the Put equal to $1,397,500,800 and the "Maximum Number" with respect to Comcast will be a number of Series A Shares having an aggregate purchase price under the Put equal to $1,500,152,640. In the event of any exercise of the Put by Cox or Comcast, as the case may be, that would cause the aggregate number of Series A Shares purchased to exceed the Maximum Number with respect to Cox or Comcast, as the case may be, such exercise shall be deemed to apply only to a number of Series A Shares that (together with all Series A Shares previously purchased pursuant to exercises of the Put by Cox or Comcast, as the case may be) would equal the Maximum Number and, upon the consummation of such Put exercise, the Put shall be deemed fully satisfied with respect to Cox or Comcast, as the case may be. If AT&T designates a subsidiary as provided in the first sentence of this paragraph (a), AT&T will unconditionally guarantee the subsidiary's obligations under the Put.

(b) The per share purchase price under the Put will be the greater of (1) $48 and (2) the average per share trading price of the Series A Shares in the Nasdaq National Market System (or the principal trading market or securities exchange on which the Series A Shares are then traded) during the 30 consecutive trading day period beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of the Put. Each of Cox and Comcast shall have the right upon any exercise of the Put, as specified in the notice of exercise, to require that AT&T (or its designee) pay the purchase price therefor in cash or in shares of AT&T common stock ("AT&T Shares") having an aggregate value equal to such purchase price, based on the average per share trading price of the AT&T Shares on the New York Stock Exchange (or the principal trading market or securities exchange on which the AT&T Shares are then traded) during the 30 consecutive trading day period beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of the Put.

(c) If the Put is exercised for AT&T Shares, AT&T and Cox or Comcast, as the case may be, will use their respective reasonable best efforts to assure that the transactions pursuant to the Put qualify as a tax-free reorganization under Section 368 of the Internal Revenue Code.

(d) Any exercise of the Put will be consummated as promptly as practicable following AT&T's receipt of the notice of exercise and the determination of the purchase price as set forth above, subject to receipt of any necessary approvals and the absence of any legal prohibition for such consummation. The purchase and sale shall also be subject to receipt of certificates containing representations and warranties substantially the same as those set forth in Section 11.9(a) and (b) of the Stockholders Agreement and to any rights of first offer or preemptive rights that may be applicable to

the sale of Series A Shares by Cox or Comcast, as the case may be.

(e) The provisions of this Section 1 will be subject to appropriate adjustments to reflect stock splits, stock dividends and other extraordinary transactions.

(f) In the event that Excite@Home separates its portal/content businesses from its platform/connectivity businesses, through a tracking stock or otherwise, AT&T, Excite@Home and Cox or Comcast, as the case may be, if requested by Cox or Comcast, as the case may be, will work together to effect a tax-free exchange, if feasible, of up to all of the Series A Shares currently owned by Cox or Comcast, as the case may be, for shares reflecting the separated portal/content businesses ("Portal Shares") on a basis that provides the same economic result to each party as would have resulted from exercise of the Put for the Maximum Number of Series A Shares then remaining subject to the Put with respect to Cox or Comcast, as the case may be. For example, if Cox or Comcast were then entitled to exercise the Put with respect to $1 billion of Series A Shares, the foregoing exchange, if elected, would entitle Cox or Comcast, as the case may be, to exchange a number of Series A Shares that would have a purchase price under the Put of $1 billion in exchange for Portal Shares having a value of $1 billion. In such event, AT&T will waive its rights with respect to a number of Portal Shares that it would otherwise have had the right to receive in an amount sufficient to compensate Excite@Home for the excess of the value of the Portal Shares issued over the value of the Excite@Home shares acquired. Alternatively, AT&T will waive its rights with respect to a number of Portal Shares that it would otherwise have had the right to receive in an amount equal to the number of Portal Shares issued to Cox or Comcast, as the case may be, and Excite@Home will issue to AT&T a number of Series A Shares equal to the number of Series A Shares exchanged by Cox or Comcast, as the case

may be, for such number of Portal Shares. In any event, such exchange will be deemed to satisfy the Put in full with respect to Cox or Comcast as the case may be.

2. Stockholders' Agreement

(a) Each of Cox and Comcast (including its applicable subsidiaries and members of its Stockholder Group and Stockholder Affiliates) hereby waives all its rights under the Stockholders Agreement, other than the provisions of Article X thereof, *provided* that Cox's and Comcast's rights under Section 4.5 of the Stockholders Agreement will survive until June 4, 2002. Without limiting the foregoing, each of Cox and Comcast hereby waives its rights under the Stockholders Agreement to representation on the Excite@Home board of directors (the "Board") and will immediately cause the resignation or removal of its current representative on the Board. When and as necessary to give effect to the intention of the parties expressed in this paragraph, each of Cox and Comcast (for itself and members of its Stockholder Group) agrees to vote (or execute consents with respect to) all shares of Voting Stock (as defined in the Stockholders Agreement) held by it or any member of its Stockholder Group in such manner as may be necessary to give effect to such waivers.

(b) Each of AT&T (including its applicable subsidiaries) and Excite@Home hereby waives all its rights under the Stockholders Agreement as against each of Cox and Comcast including its applicable subsidiaries and members of its Stockholder Group and Stockholder Affiliates), other than the provisions of Article X thereof; *provided* that, as set forth above, the provisions of Section 4.5 of the Stockholders Agreement will survive until June 4, 2002.

(c) Each of the parties hereto acknowledges that the foregoing waivers shall not constitute an amendment to the Stockholders Agreement, which shall continue in full force and effect, subject to such waivers. The parties agree that

such waivers shall be irrevocable, except as otherwise expressly set forth in the Letter Agreement to which this term sheet is an annex. In the event the parties to the Stockholders Agreement determine to terminate the Stockholders' Agreement, the relevant provisions thereof that are not waived pursuant to this Section 2 (or otherwise waived by agreement of the parties to the Stockholders Agreement) will be incorporated into this term sheet or the definitive documentation contemplated by the Letter Agreement.

3. Portal Arrangements

In the event AT&T enters into negotiations with any third party prior to June 4, 2002 with respect to a portal arrangement involving distribution over AT&T's cable facilities, AT&T will notify the third party of Cox's and Comcast's interest in exploring comparable arrangements for distribution over Cox's and Comcast's cable facilities. In such event, AT&T will also use its commercially reasonable efforts to facilitate concurrent discussions between such third party and Cox and Comcast with respect to such comparable arrangements.

4. Noncompete

Until June 4, 2006, but only for so long as Cox or Comcast, as the case may be, continues to use Excite@Home as its provider of platform/connectivity services used in its residential high-speed ISP services over cable in substantially all its United States cable systems, AT&T will not provide wireline (*e.g.*, DSL or hybrid-fiber/coaxial) high-speed Internet access services to residential customers in the territories served by the United States cable systems of Cox or Comcast, as the case may be. For the avoidance of doubt, the foregoing will not apply to any wireless high-speed Internet access services, including fixed wireless, and will not apply to any Internet access services at or below 128 Kbps.

(2)

No. 06-147

Supreme Court, U.S.
FILED
AUG 30 2006
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AT HOME CORPORATION,
Petitioner,

v.

COX COMMUNICATIONS, INC., COX @HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS, AND DAVID M. WOODROW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE COMCAST RESPONDENTS

MICHAEL S. SHUSTER *
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JAMES T. CAIN
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Counsel for Comcast Respondents

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. With respect to a hybrid derivative security (*i.e.*, one permitting exercise at either a fixed or a floating exercise price depending upon the market price of the underlying equity security at the time of exercise), whether the courts below properly ruled that the acquisition of the instrument constitutes a Section 16(b) transaction in the underlying security pursuant to 17 C.F.R. § 240.16b-6(a), and that the eventual exercise of the instrument pursuant to its fixed-price component is a non-event for Section 16(b) purposes by operation of 17 C.F.R. § 240.16b-6(b).

2. Whether the lower courts properly ruled that Comcast's acquisitions of the shares of three cable companies are not equivalent to Section 16(b) purchases of At Home warrants held by those companies in their investment portfolios that can be matched to Comcast's deemed sale of At Home stock.

CORPORATE DISCLOSURE STATEMENT

No publicly-held corporation owns 10% or more of the stock of Comcast Corporation. Comcast Online Communications, Inc. and Comcast PC Investments, Inc. certify that Comcast Corporation is their corporate parent and that no publicly-held corporation other than Comcast Corporation owns 10% or more of their stock.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTIONS PRESENTED	(i)
CORPORATE DISCLOSURE STATEMENT	(ii)
TABLE OF AUTHORITIES	(v)
BRIEF IN OPPOSITION ON BEHALF OF THE COMCAST RESPONDENTS	1
STATEMENT OF THE CASE	3
A. The Complaint And The District Court's Decision	3
B. The Second Circuit's Decision And The SEC's Amicus Brief	4
REASONS FOR DENYING THE WRIT	6
I. ON COUNT I, THE SECOND CIRCUIT CORRECTLY HELD THAT THE ACQUISITION OF THE PUT OPTION WAS A SECTION 16(B) SALE AND THAT ITS SUBSEQUENT FIXED-PRICE EXERCISE WAS EXEMPT	6
A. The Lower Courts Correctly Applied The Rules Under Section 16(b) To The Put Option	6
B. The Arguments Presented In The Bondholders' Petition Do Not Identify Any Error In The Lower Courts' Application Of The Applicable Rules	8
1. The Bondholders Improperly Raise A New Argument In Their Certiorari Petition	8

TABLE OF CONTENTS—Continued

	Page
2. The Bondholders' Reliance On Rule 16a-1(c) Is Misplaced	12
3. The Bondholders' Self-Defeating "Market Reality" And "Increased Risk" Arguments	14
4. The Bondholders' Spurious "Hindsight" Argument	17
II. ON COUNT II, THE LOWER COURTS CORRECTLY DETERMINED THAT COMCAST'S PURCHASES OF CABLE COMPANY SECURITIES COULD NOT BE MATCHED TO ITS DEEMED SALE OF AT HOME SECURITIES	18
A. The Lower Courts Correctly Ruled That The Challenged Transactions Fall Outside The Scope Of Section 16(b) As Determined By The Statute's Plain Language	18
B. The Countertextual Reading Of Section 16(b) Advocated By The Bondholders Would Create An Unprecedented Expansion Of The Statute Far Beyond Its Literal And Intended Scope	22
CONCLUSION	25
APPENDIX A	1a
APPENDIX B	35a

TABLE OF AUTHORITIES

CASES — Page

American Standard Co. v. Crane Co, 510 F.2d 1043 (2d Cir. 1974) 3, 19, 20
Burnette v. Carothers, 192 F.3d 52 (2d Cir. 1999) 11
Cioffi v. Averill Park Cent. Sch. Distr. Bd. of Ed., 444 F.3d 158 (2d Cir. 2006) 11
City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987) 11–12
Davenport v. Harry N. Abrams, Inc., 249 F.3d 130 (2d Cir. 2001) 11
Gwozdzinsky v. Zell/Chillmark Fund, L.P., 156 F.3d 305 (2d Cir. 1998) 24
Heublein, Inc. v. Gen. Cinema Corp., 722 F.2d 29 (2d Cir. 1983) 17
Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) 21, 22
Mellon Bank N.A. v. United Bank Corp., 31 F.3d 113 (2d Cir. 1994) 11
Reliance Elec. Co. v. Emerson Ele. Co., 404 U.S. 418 (1972) 22
Schaffer v. CC Invs., LDC, 280 F. Supp. 2d 128 (S.D.N.Y.), *recon. granted in part*, No. 99-2821, 2003 WL 22480052 (S.D.N.Y. Oct. 31, 2003) 14
Strauss v. Comcast Corp., 149 Fed. Appx. 15 (2d Cir. 2005) 20
U.S. v. Ortiz, 422 U.S. 891 (1975) 12

STATUTES, REGULATIONS AND RULES

17 C.F.R. § 240.16a-1 ..... 6, 12
17 C.F.R. § 240.16b-6 ..... 6, 13, 14, 16, 18
15 U.S.C. § 78c(a)(13) 22
15 U.S.C. § 78p(b) 17, 19

TABLE OF AUTHORITIES—Continued

OTHER

Page

Ownership Reports and Trading by Officers, Directors, and Principal Security Holders, Exchange Act Release No. 28,869, 1991 WL 292000 (Feb. 21, 1991)..... 7

IN THE

Supreme Court of the United States

No. 06-147

AT HOME CORPORATION,

Petitioner,

v.

COX COMMUNICATIONS, INC., COX @HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENT, INC., BRIAN L. ROBERTS, AND DAVID M. WOODROW,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION ON BEHALF OF THE COMCAST RESPONDENTS

In their petition for a writ of certiorari, petitioners, representing former bondholders of the defunct At Home Corporation (the "Bondholders"), challenge the dismissal of two, alternative claims under Section 16(b) of the Securities Exchange Act of 1934 (relating to "short swing" profits on purchases and sales of securities by an issuer's insiders, all as defined). Each of these claims arises from the acquisition and exercise of a hybrid derivative security[1] (the "Put Option")

[1] A "hybrid" derivative is a right to buy or sell a security that contains both fixed and floating price components and is exercisable at one or the other depending upon the terms of the instrument and the market price of

which gave Comcast[2] the right to sell its At Home common stock to AT&T Corp. at the greater of $48 per share or the applicable thirty trading-day average market price of At Home stock. For their first claim, the Bondholders challenge the lower courts' determination that Comcast's acquisition of the Put Option was equivalent to a sale of the underlying At Home securities by virtue of Securities and Exchange Commission ("SEC") Rule 16b-6(a), and that Comcast's subsequent exercise of the Put Option at its fixed price component was an exempt event under Rule 16b-6(b). For their second claim, the Bondholders argue that the lower courts improperly ruled that Comcast's deemed sale of *At Home* stock could not be matched to Comcast's purchases of the stock of *three other cable companies* whose securities portfolios happened to contain, among other things, At Home warrants.

The Bondholders have failed to identify any reason for granting certiorari in this case. There is no split of authority among the circuit courts: the Second Circuit is the only court of appeals to have applied Section 16(b) in the context of hybrid derivative securities. No aspect of the Second Circuit's decision touches upon any important federal question that conflicts with relevant Supreme Court authority. With respect to Count I of the Complaint, the Bondholders continuously maintained throughout this litigation that the Put Option was different from "any instrument in any other reported case" and that the analytical approach adopted in

---

the security. *See* Petitioner's App. A (Second Circuit opinion) at 4a ("The Letter Agreement grants a 'hybrid option' because the pricing formula has both fixed and floating components."); Petitioner's App. B (district court decision) at 23a ("The question presented . . . is how to apply § 16(b) to options containing both a fixed and a floating component ('hybrids').").

[2] Respondents Comcast Corporation, Comcast Online Communications, Inc., and Comcast PC Investments, Inc. are collectively referred to herein as "Comcast."

those cases "simply does not 'work' when applied to the unique instrument at issue here." Appellant's Br. at 24, 37. This Court has also previously denied certiorari with respect to the very issue asserted in Count II, letting stand the Second Circuit's determination that Section 16(b) applies only to single-issuer transactions. *See American Standard Co. v. Crane Co.*, 510 F.2d 1043 (2d Cir. 1974), *cert den'd*, 421 U.S. 1000 (1975). Indeed, though the Bondholders fail to mention the fact in their petition, the Second Circuit issued its decision after requesting an amicus brief from the SEC that also concluded that these claims should be dismissed. In truth, the only reason for this petition is that it represents the Bondholders' last chance at obtaining a windfall recovery based on two novel theories of short-swing liability that have been reviewed and rejected by the courts below and the SEC as contrary to both the letter and the spirit of Section 16(b). For these and the reasons discussed below, the Bondholders' petition should be denied.

STATEMENT OF THE CASE

A. The Complaint And The District Court's Decision

In Count I of their Complaint, the Bondholders alleged that Comcast's purported exercise of the Put Option at its *fixed price component* on January 11, 2001 constituted a Section 16(b) sale of the underlying At Home securities that could be matched to a putative deemed "purchase" of At Home stock on May 18, 2001 under the six-month short-swing profits rules and regulations. *See* Complaint ¶¶ 64–72 (Petitioner's App. G at 57a–59a). In Count II, the Bondholders alternatively alleged that Comcast's acquisition of the Put Option on March 28, 2000 constituted a deemed Section 16(b) sale of the underlying At Home stock that could be matched *not* with any actual or deemed purchase of At Home securities, but rather with Comcast's acquisitions of all of the outstanding shares of three different cable companies which happened to

hold At Home warrants in their investment portfolios. *See id.* ¶¶ 73-76 (Petitioner's App. G at 59a).

Comcast moved to dismiss both counts for failure to state a claim. The district court granted the motion with respect to Count I on the grounds that, under the applicable SEC rules, a Section 16(b) "sale" event occurs when a derivative containing a fixed price component (such as the Put Option) was established, and the subsequent exercise of the derivative at that fixed price is an exempt (irrelevant) occurrence. *See* Petitioner's App. D at 25a–26a. Consequently, the court held that Count I failed to state a claim because more than six months had elapsed between the "only conceivable purchase-equivalent event" (the Put Option's putative "cancellation" on May 18, 2001) and the "only sale-equivalent event" alleged (the Put Option's establishment on March 28, 2000). *See id.* at 25a. The district court dismissed Count II because it determined that Comcast's purchases of the cable companies' shares were not vehicles for speculating in the At Home warrants held by those companies in their investment portfolios and thus fell outside the scope of Section 16(b). *See id.* at 29a.

B. The Second Circuit's Decision And The SEC's Amicus Brief

On appeal, the Second Circuit affirmed the dismissal of the Bondholders' claims. After oral argument but prior to rendering its decision, the Second Circuit solicited comment from the SEC on the Bondholders' novel Section 16(b) theories. With respect to the issue presented in Count I, the SEC reasoned that the *establishment* of the Put Option must be deemed the operative Section 16(b) event because the hybrid's fixed price component presented an immediate opportunity to abuse inside information, whereas the subsequent exercise of the option at the fixed price was exempt under Rule 16b-6(b). *See* Comcast's App. A at 13a. On Count II, the SEC concluded that Comcast's purchases of the

cable companies' securities did not constitute purchases of At Home securities within the scope of Section 16(b) because "indirect and incidental acquisition[s]" pursuant to change of control transactions are not vehicles for speculative insider trading of the sort that Congress enacted the statute to prevent. *Id.* at 17a.

As to Count I, the Second Circuit agreed with the SEC and the district court that the Put Option was indeed a hybrid derivative containing "both fixed and floating [price] components." Petitioner's App. A at 4a. From this foundation, the court held that Rules 16b-6(a) and (b) easily "decide[d] this case" by their plain terms. *Id.* at 8a. Because the Put Option contained a fixed price, Rule 16b-6(a) mandated that the *acquisition* of the Put Option be considered a Section 16(b) sale of the underlying At Home shares; further, because the Put Option was eventually exercised pursuant to its fixed price component, that event was *exempt* by operation of Rule 16b-6(b). *See id.*

The Second Circuit also affirmed the district court's dismissal of Count II, but on different grounds. The circuit court found that the plain language of Section 16(b) precluded matching transactions in the securities of more than one issuer:

> Section 16(b) speaks of matching transactions in the equity securities of one issuer, and disgorging 'any profit realized . . . from any purchase and sale, or any sale and purchase, of *any equity security of such issuer*.' Use of the singular ('any equity security' and 'such issuer') supports an inference that a transaction in the equity securities of one company [*i.e.*, the cable companies] cannot be matched with a transaction in the equity securities of another [*i.e.*, At Home].

Id. at 10a.

REASONS FOR DENYING THE WRIT

I. ON COUNT I, THE SECOND CIRCUIT CORRECTLY HELD THAT THE ACQUISITION OF THE PUT OPTION WAS A SECTION 16(B) SALE AND THAT ITS SUBSEQUENT FIXED-PRICE EXERCISE WAS EXEMPT

A. The Lower Courts Correctly Applied The Rules Under Section 16(b) To The Put Option

SEC Rule 16a-1(c) defines the term "derivative security" to include "any option . . . with an exercise or conversion privilege at a price related to [or] a value derived from the value of an equity security." 17 C.F.R. § 240.16a-1(c). As alleged in the Complaint, the Put Option is plainly an "option" with an exercise price "related to" or "derived from the value of" an equity security (here, At Home common stock). More precisely, within the broader class of derivative securities, the Put Option qualifies as a "put equivalent position" because it "increases in value as the value of the underlying equity decreases." *Id.* § 240.16a-1(h).

In light of the recognized equivalence between derivative instruments and their underlying equity securities (*see infra* n.3), Rule 16b-6(a) provides that the "*establishment* of . . . a put equivalent position . . . shall be deemed a sale of the underlying securities for purposes of Section 16(b)." *Id.* § 240.16b-6(a) (emphasis added). To avoid double liability and recovery with respect to the same instrument, Rule 16b-6(b) provides that the *exercise* of a put equivalent position is an exempt event for Section 16(b) purposes:

> [T]he closing of a derivative security position as a result of its *exercise* or conversion shall be exempt from the operation of Section 16(b), and . . . the disposition of underlying securities *at a fixed exercise price* due to the *exercise* of a put equivalent position shall [also] be exempt. . . .

Comcast's App. B at 35a (emphasis added).

Applying these rules, a Section 16(b) sale event occurred on March 28, 2000 when the Put Option was established, and the subsequent closing of the Put Option when it was exercised at its fixed-price component more than ten months later was a non-event for purposes of the statute. Because the putative "purchase" event alleged in Count I occurred on May 18, 2001, nearly fourteen months after the establishment of the Put Option, Section 16(b) does not apply.

This result—reached by both the lower courts and the SEC—is entirely proper, given that the acquisition of a derivative instrument such as the Put Option guarantees its holder an opportunity to sell a maximum number of underlying shares at a *minimum* price of $48 per share. If the acquisition of the option were *not* deemed to be a sale event, then the holder of such an instrument with inside information that would adversely affect stock price could simply (i) acquire such an option with a minimum exercise price of $48 per share, (ii) buy shares in the market the next day, say, at $45 per share, (iii) wait six months and a day before exercising the option, and (iv) realize an unrecoverable $3 per share short-swing profit. In other words, the approach which the Bondholders steadfastly advocated below would reopen the very loophole that the SEC sought to close through its 1991 amendments of the rules under Section 16(b).[3]

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[3] One of the factors motivating the SEC's 1991 amendments to the rules under Section 16(b) was the concern that the former rules permitted insiders to exploit non-public information without liability by engaging in transactions in fixed price derivative securities as exemplified above. *See Ownership Reports and Trading by Officers, Directors, and Principal Security Holders*, Exchange Act Release No. 28,869, 1991 WL 292000 (Feb. 21, 1991), at *11 ("The functional equivalence of derivative securities and their underlying equity securities for Section 16 purposes requires that the acquisition of the derivative security be deemed the significant event, not the exercise. Failure to recognize [this] would permit insiders

B. The Arguments Presented In The Bondholders' Petition Do Not Identify Any Error In The Lower Courts' Application Of The Applicable Rules

1. *The Bondholders Improperly Raise A New Argument In Their Certiorari Petition*

In their petition, the Bondholders claim that the "driving issue" in this case, which was incorrectly decided by the circuit court, is "*when* the matching sale occurred for § 16(b) purposes" with respect to the Put Option: (i) upon acquisition on March 28, 2000; (ii) on February 2, 2001, fifteen trading days following exercise; "or (iii) on *both* dates *as At Home argued to the Second Circuit.*" Cert. Pet. at 9 (italics in original; underlining added). As to the third point, this representation is misleading. The Bondholders never argued in the district court that a sale event occurred *both* upon establishment and exercise of the Put Option, and did not address this argument in the Second Circuit until after oral argument was complete and the parties were asked to comment on the SEC's amicus brief.

In the Second Circuit, the Bondholders argued that the district court committed reversible error when it held that "a Section 16(b) sale 'first' occurred when the Put [Option] was created and that a 'second' Section 16(b) event might have occurred when the number of shares and price per share were fixed 11 months later" when the Put Option was exercised (if such exercise were at the floating price component). Appellant's Br. at 2. Indeed, in criticizing the district court's observation that a hybrid option exercised at its floating price component (a situation not raised by the facts in this case) may result in two events, the Bondholders vehemently argued that the Put Option was *not* a hybrid derivative, did *not*

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to evade disgorgement of short-swing profits simply by . . . *buying underlying stock and buying put options.*") (emphasis added).

contain a fixed price component, did *not* present an opportunity for speculative abuse upon acquisition, and thus could *not* have given rise to Section 16(b) events *both* at acquisition and at exercise:

- "Under governing SEC Rules, a Put Instrument [such as the Put Option] without a fixed price per share is **not** considered a derivative security, and there is no Section 16(b) event, *i.e.* no sale, when such an instrument is created." Appellant's Br. at 20 (emphasis in original);
- "You could have two transactions [with a hybrid derivative]. *It can't be done* [with the Put Option] in our case. . . ." Oral Argument Transcript at 5 (emphasis added);
- "[A] security [like the Put Option] where neither the price per share nor the number of shares are known is *not* deemed a derivative security, and the creation of such a security is *not* [an event] under Section 16(b)." Appellant's Reply Brief at 9 (emphasis added).[4]

Rather, the Bondholders insisted that the Put Option "functioned" or "operated as a floater" (*i.e.*, an instrument with *only* a floating price) and thus did not become a "derivative security" subject to Section 16(b) at all until notice of exercise was given and the share price became determinate.[5]

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[4] *See also* Appellant's Br. at 33 ("As alleged in the Complaint, the [Put Option] does *not* contain one fixed and one floating component." (emphasis added)); *id.* at 37 ("[The Put Option] was *not* susceptible to a fixed conversion at a minimum level and then an additional conversion per a floating component." (emphasis added)); Oral Argument Transcript at 36 ("[T]he one thing that is crystal clear is we said [the establishment of the Put Option] was not a sale. There was *no event* under 16(b) until *after* [Comcast] gave notice [of its intent to exercise] and you knew the number of shares and the price of those shares." (emphasis added)).

[5] *See, e.g.*, Appellant's Br. at 5 (arguing that the Put Option "functioned as a 'floating put'"); *id.* at 20 ("the Put at issue here operated as a

On this basis, the Bondholders argued that the *first and only* Section 16(b) event with respect to the Put Option occurred upon its *exercise*:

- "[On February 2, 2001 (*i.e.*, 15 trading days after Comcast exercised the Put Option)], and *only* at that time, did AT&T have a binding obligation to buy a fixed number of shares at a set price; at *only* that time was a 'put equivalent position' established which, under SEC Rules, is the equivalent of a Section 16(b) sale." Appellant's Br. at 17 (emphasis added);
- "[B]ecause the [Put Option] here functions like a floater, the Court should apply Rule 16a-1(c)(6) on its face, and treat the Put as a derivative security within the meaning of the Rule *only* when the price per share is set for the first time—that is, 15 days after notice of exercise was given. . . ." *Id.* at 41 (emphasis added).
- "*Only* fifteen days after . . . Comcast gave notice to AT&T of [its] intent to exercise the [Put Option] did this instrument become a derivative security and a 'sale' occur under Section 16(b)." Appellant's Reply Br. at 9 (emphasis added).[6]

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floater"); *id.* at 28 (arguing that the Put Option "functioned as a floater"); 41 (same).

[6] *See also* Appellant's Br. at 20 ("[A]s alleged in the Complaint, the Section 16(b) sale occurred . . . after notice had been given and the number of shares and price per share was [sic] first set."); *id.* at 32 ("[A]s alleged in the Complaint, the Put [Option] was not established under the SEC Rules until February 2, 2001 when the number of shares and price per share were set by operation of the [hybrid] pricing mechanism. . . ."); Appellant's Reply Br. at 9 ("*Only* fifteen days after . . . Comcast gave notice to AT&T of [its] intent to exercise the [Put Option] did this instrument become a derivative security and a 'sale' occur under Section 16(b)." (emphasis added)).

In sum, up until after oral argument in the Second Circuit, it has never been the Bondholders' position that the Put Option presented two opportunities for speculative abuse, much less that it gave rise to two distinct Section 16(b) events. To the contrary, the Bondholders expressly argued that recognizing the possibility of two sale events to calculate profits on a hybrid option exercised at its floating price component would be an "egregious error" that would "only serve to confuse market participants, their advisors and courts."[7] Appellant's Reply Br. at 12. As this Court has routinely recognized, certiorari should not be granted where a petitioner presses an argument which it did not raise (or, as here, emphatically and consistently *disavowed*) below. *See, e.g., City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258

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[7] The Bondholders' only non-derisory reference to the notion that the Put Option could present two Section 16(b) events appeared in supplemental briefing solicited by the Second Circuit to comment on the SEC's *amicus* brief. Even there, however, the Bondholders did not endorse a two-event approach to the Put Option, but simply noted that "nothing in the SEC's perfunctory discussion precludes a finding" that the Put Option presented two opportunities for speculative abuse. Appellant's Supp. Br. at 4. In fact, this characterization of the SEC's opinion is incorrect: the SEC specifically noted that "[i]f inside information is learned only after the fixed price is set [*i.e.*, upon acquisition], the information *cannot be abused* in later exercising at the fixed price." Comcast's App. at 13a (emphasis added). In any event, even if the Bondholders' change of heart could be viewed as genuine, it came too late. The Bondholders could not raise an argument in the Second Circuit that they failed to raise in the district court. *Davenport v. Harry N. Abrams, Inc.*, 249 F.3d 130, 132 (2d Cir. 2001) (argument not raised in the district court should not be considered on appeal); *Mellon Bank N.A. v. United Bank Corp.*, 31 F.3d 113, 116 (2d Cir. 1994) (same); *Burnette v. Carothers*, 192 F.3d 52, 58 (2d Cir. 1999) (appellants waived an argument not raised in the district court). They certainly could not raise such an argument for the first time in a supplemental brief after oral argument. *See, e.g., Cioffi v. Averill Park Cent. Sch. Distr. Bd. of Ed.*, 444 F.3d 158, 169 (2d Cir. 2006) (new argument raised for the first time in reply brief was untimely and deemed waived).

(1987) (dismissing writ as improvidently granted, where position advocated by petitioner before the Supreme Court was not pressed at the district or circuit level); *U.S. v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue which was first raised in certiorari petition).

2. *The Bondholders' Reliance On Rule 16a-1(c)(6) Is Misplaced*

Paradoxically, at the same time that they press their new "two-event" theory, the Bondholders persist in arguing that the Put Option was not a derivative security *at all* within the meaning of Rule 16a-1(c)(6) because neither "the actual number of shares to be sold [nor] the price per share to be paid" were fixed at the time the instrument was established. Cert. Pet. at 5. This argument is wrong for several reasons.

In the first place, as the lower courts recognized, the cited rule requires only that an instrument's exercise or conversion *price* be fixed. Rule 16a-1(c)(6) excludes from the definition of derivative security "rights with an exercise or conversion privilege at a *price* that is not fixed." 17 C.F.R. § 240.16a-1(c)(6) (emphasis added). The rule does *not* require (or even suggest) that the number of underlying shares subject to the instrument be fixed in order for it to qualify as a "derivative security."

Next, it is plain here that the Put Option *did* contain a fixed exercise price: $48 per share. As the Second Circuit correctly noted, this reality cannot be ignored simply because the Put Option also contained a floating price component:

> As with many hybrid options . . . the [Put Option] contained a possible fixed price ($48 per share) payable depending on the market price at the time of exercise. *The prospect of a higher exercise price does not mean that there is no fixed-price component; the prospect of a higher price is what makes the option a "hybrid" in the first place.*

Petitioner's App. A at 5a n.2 (emphasis added).

In any event, as the Second Circuit and district court rightly observed, the maximum number of shares subject to the Put Option for Comcast (31,253,180) is easily calculated by dividing the total consideration the option's writer could be required to pay Comcast—$1,500,152,640 (*see* Petitioner's App. H at 72a)—by the fixed price of $48 per share (which was the minimum sale price possible under the Put Option). *See* Petitioner's App. A at 5a n.2.

Finally, there is no support in the SEC rules for the Bondholders' newly-asserted argument that a hybrid like the Put Option that was exercised at its fixed price component presented *two* opportunities for abuse and thus gave rise to Section 16(b) sales "on *both* dates." Indeed, if the Put Option did not contain a fixed price component *ab initio*, there would be no conceivable reason—and the Bondholders have not identified any basis in the rules—for treating its establishment as a sale on March 28, 2000. To the extent that the Bondholders now agree that the Put Option *did* contain a fixed price option, Rule 16b-6(a) requires that its establishment be treated as a sale event, but the Bondholders cite no rule that would require—much less permit—the subsequent fixed price exercise to be treated as a second sale. To the contrary, Rule 16b-6(b) (which the Bondholders did not see fit to include in their appendix) requires that the Put Option's exercise at its fixed $48 price component be *exempt* from the statute.[8] *See* Comcast's App. B at 35a.

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[8] To clarify, the Bondholders' proposed two-step approach for a hybrid put exercised at its *fixed* price component (such as the Put Option) must be distinguished from the two-step calculation of short swing profits for a hybrid option exercised at its *floating* price, a situation not presented by the facts of this case. As stated in the text above, the Bondholders' approach contravenes the SEC rules because Rule 16b-6(b) expressly requires that the Put Option's exercise at its fixed price component be exempt. On the other hand, the SEC rules do not forbid—and, in addition to the district court in this case, at least one other court has recognized—

3. *The Bondholders' Self-Defeating "Market Reality" and "Increased Risk" Arguments*

The Bondholders also fault the circuit court's conclusion that the exercise of the Put Option at its fixed price component was a non-event by application of Rule 16b-6(b). In so ruling, the Bondholders contend, the Second Circuit improperly "refused" to consider "market realities" and "ignored [that] the risk of speculative abuse with respect to the Put . . . dramatically increased as . . . Comcast approach the point when [it] could file a notice [of exercise] under the Put and when the number of shares and the price per share would be set for the first time." Cert. Pet. at 10. This argument is misplaced for several reasons.

First, it is clear that what the Bondholders characterize as "marketplace realities" (*i.e.*, the fact that "all . . . Comcast knew" on March 28, 2000 was that the Put Option entitled it to sell up to 31,253,180 shares of At Home at a minimum price of $48 per share, *see* Cert Pet. at 10) were simply the terms of the Put Option itself. *See supra* at 1, 12–13. Contrary to the Bondholders' assertion, the Second Circuit took this reality into account when it rendered its decision. *See, e.g.*, Petitioner's App. A at 4a–5a (discussing operation of hybrid pricing mechanism); *see id.* at 5a n.2 (noting that the "maximum number of shares [subject to the Put Option] is likewise fixed").

Second, this "market reality" argument rings hollow given that the Bondholders fault the lower courts for having taken such realities into account. For example, the Bondholders criticized the district court for concluding that the Put Option's floating price component was "irrelevant" at the

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the application of a two-step approach to calculate short-swing profits from a hybrid option exercised at its floating price. *See Schaffer v. CC Invs., LDC*, 280 F. Supp. 2d 128 (S.D.N.Y.), *recon. granted in part*, No. 99-2821, 2003 WL 22480052 (S.D.N.Y. Oct. 31, 2003).

time of exercise based on the "undisputed" reality (confirmed in the Complaint, no less) that the market price for At Home stock in the days preceding exercise was "far below the fixed minimum of $48 per share." Petitioner's App. D at 26a.[9]

Equally spurious is the Bondholders' assertion that the circuit court failed to consider the "reality" that an insider holding an instrument like the Put Option cannot engage in "effective hedging" at the time it is established. Cert. Pet. at 10; *see also id.* at 11 ("Hedging . . . do[es] not work when a party has no idea of the number of shares to be hedged."). This argument is a straw man, and makes no more sense now than it did when the Bondholders presented it below.

Section 16(b) is not concerned with hedging; rather, its purpose is to deter insiders from speculating based on inside information by requiring the disgorgement of profits earned by an insider from matching purchases and sales of issuer securities occurring within a six month period. Any "hedging" an insider might try to engage in (be it "effective" or not) with respect to the acquisition of an instrument like the Put Option would itself be treated as a Section 16(b) event, and the "loss" hedged against would be subject to immediate disgorgement. Moreover, the very notion that an insider, benefiting from access to non-public information and holding a *long* derivative position, would need (or bother) to engage in hedging is absurd: if the instrument's exercise price were unfavorable relative to the prevailing market price (*e.g.*, if the exercise price for a call option is greater than market price), all the holder would need do to avoid a "loss" would be to *refrain from exercising the option.*

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[9] *See* Oral Argument Transcript at 9 ("When Cox and Comcast [exercised the Put Option], your Honor, they said, we assume the price will be $48. Only the district court knew, said it was undisputed that he stock price was going to be [$]48. Wrong; it was disputed, your Honors. Nobody knew. . . .").

Fourth, and more fundamentally, the Bondholders' argument that the "risk" of speculative abuse with respect to the Put Option "dramatically increased" as the "10-month waiting period came to end" (*i.e.*, when the Put Option first became exercisable) makes no sense whatsoever. On page 11 of their petition, the Bondholders provide an example which purportedly demonstrates why the exercise of a hybrid at its *fixed* price component should not be an exempt event as required by Rule 16b-6(b). In that example, the Bondholders posit that, more than ten months after the option was established, an insider could obtain non-public information indicating that At Home planned to release bad and then good news. According to the Bondholders, the insider could (i) wait until the release of bad news when the stock price drops to $24 per share, (ii) exercise the Put Option at the fixed price of $48 per share, and then (iii) immediately buy At Home stock in the market at $24 per share before the good news is released and the price rebounds. The Bondholders argue that, unless the fixed price exercise is also treated as a Section 16(b) sale, this $24 per share profit could not be recovered.

What the Bondholders fail to mention (or, apparently, to even realize) is that the "risk" which they deem intolerable in the foregoing example is *no different* than the "risk" presented by a pure fixed price option (i.e., one exerciseable at $48 per share *only*). As in the Bondholders' scenario, the holder of such an option could profit in *exactly the same manner* as in the prior example by (i) waiting until the stock dropped to $24, (ii) exercising the put at its $48 per share price, and then (iii) immediately buying back shares in the market at $24. The profit realized here, of course, would plainly not be subject to disgorgement because the closing of the option and sale of underlying securities would undeniably be exempt by operation of Rule 16b-6(b) *See* 17 C.F.R. § 240.16b-6(b).

In short, if the "risk" described by the Bondholders can possibly be viewed as "unacceptable," the fault lies in the

Section 16(b) rules themselves, not in their faithful application by the Second Circuit and the district court. Indeed, what the Bondholders complain about is the reality that Section 16(b), a strict liability statute, "'is simply not an antidote to all the ills that may plague the securities market.'" Petitioner's App. A at 12a (quoting *Heublein, Inc. v. Gen. Cinema Corp.*, 722 F.2d 29, 31 (2d Cir. 1983)).

4. *The Bondholders' Spurious "Hindsight" Argument*

Finally, the Bondholders condemn the Second Circuit for establishing a "hindsight" test for applying Section 16(b) to "complex hybrid instruments." Cert. Pet. at 12. This criticism is both unpersuasive and misplaced.

As an initial matter, the Bondholders provide no explanation as to why a "hindsight" application would be problematic, much less inconsonant with the broader statutory regime. Indeed, they would be hard pressed to do so, given that Section 16(b) expressly exhorts courts to look both forward *and backward* from a purchase of issuer securities to find a profit-making sale. *See* 15 U.S.C. § 78p(b) ("[A]ny profit realized by [an insider] from any purchase and sale, *or any sale and purchase*, of any equity security of [the] issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer.").

In any event, the Second Circuit's decision did not establish a "hindsight" test. Strictly applying Rules 16b-6(a) and (b), the court held: (i) that the establishment of the Put Option on March 28, 2000 constituted a matchable sale of the "maximum number" of At Home stock at $48 per share; and (ii) that the closing of the Put Option approximately 11 months later as a result of its fixed price exercise was a statutorily exempt event. *See* Petitioner's App. A at 8a. This result required no "hindsight" whatsoever.

With respect to the *hypothetical* exercise of the Put Option at its *floating* price component (an event which the Bondholders concede did not occur), the Second Circuit exhibited restraint and expressly declined to formulate a legal rule concerning facts not presented in this case. However a floating price exercise might or should be treated, because the Put Option was exercised at its *fixed* price component here (an exempt event under Rule 16b-6(b)), the court's determination that a Section 16(b) sale event "occurred only with the acquisition of the . . . options" was indisputably correct. *Id.*

II. ON COUNT II, THE LOWER COURTS CORRECTLY DETERMINED THAT COMCAST'S PURCHASES OF CABLE COMPANY SECURITIES COULD NOT BE MATCHED TO ITS DEEMED SALE OF AT HOME SECURITIES

A. The Lower Courts Correctly Ruled That The Challenged Transactions Fall Outside The Scope Of Section 16(b) As Determined By The Statute's Plain Language

In Count II of their Complaint, the Bondholders concede that the *establishment* of the Put Option was a Section 16(b) sale event, but improperly seek to match that sale, not to any purchase of At Home securities, but rather to Comcast's acquisition of the shares of three cable companies—unrelated to At Home—for nearly **$10 billion**. In advancing this claim, the Bondholders seek to equate the purchase of cable company shares with Section 16(b) purchases of the securities held by those companies in their investment portfolios, which in this case happened to include At Home warrants.[10] The Second Circuit (as well as the district court and the SEC)

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[10] As the district court noted, the maximum potential value of the warrants was less than 3% of the $10 billion Comcast spend to acquire the cable companies. *See* Petitioner's App. D at 29a n.12.

correctly determined that the transactions alleged in Count II do not fall within the short-swing statute.

On its face, Section 16(b) is geared toward preventing an issuer's insiders from profiting from non-public information by engaging in transactions in "any equity security" of "such issuer." 15 U.S.C. § 78p(b). As the Second Circuit has rightly recognized, the statutory "[u]se of the singular ('any equity security' and 'such issuer') supports an inference that a transaction in the equity securities of one company cannot be matched with a transaction in the equity securities of another." Petitioner's App. A at 10a. In other words, by its express terms, Section 16(b) applies only to matching transactions involving the securities of the *same* issuer.

Because Count II of the Complaint sought to match transactions in the securities of *different* issuers (*i.e.*, purchases of cable companies' securities with a deemed sale of At Home securities), the circuit court correctly concluded that the Bondholders had not pled a viable Section 16(b) claim. In so ruling, the court was not blazing new ground. To the contrary, the decision below marked the third time that the Second Circuit has refused to expand the statute to embrace situations where the securities actually bought and sold (or deemed bought and sold, in the case of derivative instruments) were of different issuers.

In *American Standard Co. v. Crane Co.*, the Second Circuit addressed the fundamental question presented by the Bondholders' Count II: "whether Section 16(b) permits a statutory liability to attach by matching the purchase[] of the shares of one 'issuer' against the sale of shares of another 'issuer.'" 510 F.2d at 1057. After extensive analysis of the statute's text and legislative history, the court squarely ruled that "the style and substance [of the statute] lead to the conclusion that Congress was concerned with a *single* issuer." *Id.* at 1059 (emphasis added); *see also id.* at 1058 ("The statute speaks of 'such issuer' in the *singular*. There is no room for a

grammatical construction that would convert the singular into a plural.") (emphasis added). Based on this plain reading of the statute, the court held that a purchase of a pre-merger company's securities could not be matched for Section 16(b) purposes to a sale of the post-merger company's securities. This Court denied petitioner's subsequent certiorari petition. 421 U.S. 1000.

The Second Circuit reached the same result more recently in *Strauss v. Comcast Corp.*, 149 Fed. Appx. 15 (2d Cir. 2005). There, plaintiff sought to match (i) Comcast's sale of its shares in QVC, with (ii) third-party ITH's purchase of GSI shares. *See id.* at *16. Notwithstanding plaintiff's allegation that QVC owned a sizeable stake in ITH, and that ITH was a 10% beneficial owner of GSI stock, the court held that the case did "not fall within the purview of Section 16(b) because the issuer of the securities purchased [*i.e.*, GSI] is substantially separate from the issuer of the securities sold [*i.e.*, QVC]." *Id.*

As such, the Second Circuit's ruling that the Bondholders' allegations of purchases and sales of different issuers' securities failed to state a cognizable Section 16(b) claim was correct and consistent with its prior holdings in *American Standard* and *Strauss*. Alternatively, Count II was properly dismissed, as stated by the district court, on the basis of the "unorthodox transaction" doctrine. *See* Petitioner's App. D. at 28a–29a. To the extent that Comcast's purchase of the cable companies' shares can be viewed at all as "transactions" in the issuer securities held by those companies in their portfolios, they were manifestly *not* the type of "garden-variety" transactions to which Section 16(b) presumptively applies. Rather, the "indirect" acquisition via change-of-control transactions alleged in Count II are, on their face, borderline or unorthodox—a fact borne out by the total

absence of decisional authority showing that Section 16(b) has *ever* been applied in such circumstances.[11]

In *Kern County*, this Court endorsed a "pragmatic approach" to analyzing such borderline transactions, which entails an assessment of "whether the transaction may serve as a vehicle for the evil which Congress sought to prevent. . . ." *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594 (1973). Here, the determination by both the Second Circuit and the SEC that change-of-control transactions such as those alleged in Count II do not present plausible opportunities for speculative abuse amply supports the district court's application of the unorthodox transaction in this case. *See* Petitioner's App. A at 11a ("The SEC convincingly argues that a typical change-of-control transaction does not present an intolerable risk of abuse."), *id.* at 12a ("We conclude that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks and opportunities independent of the risks and opportunities that inhere in the stock of the issuer."); *see also* Comcast's App. A at 18a ("While it is not beyond possibility that an acquiror would tailor a change of control transaction to obtain short-swing profits from insider trading, it is certainly not going to be a common scenario. Good faith change in control transactions are not ones 'in which the possibility of abuse [is] intolerably great.'") (quoting *Kern County*, 411 U.S. at 592).

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[11] Given the frequency with which companies buy and sell stakes in one another, indirect or incidental "transactions" in the issuer securities held by the bought and sold companies are inevitable; if such transactions fall within the scope of Section 16(b), claims such as the Bondholders' should be commonplace. They are not. As the district court correctly noted, this "absence of precedent" strongly supports the view that such change-of-control transactions are "unorthodox" to the extent that they concern the portfolio securities held by the subject companies. Petitioner's App. D at 28a.

B. The Countertextual Reading Of Section 16(b) Advocated By The Bondholders Would Create An Unprecedented Expansion Of The Statute Far Beyond Its Literal And Intended Scope

In a transparent attempt to manufacture a "circuit split" meriting grant of certiorari with respect to Count II, the Bondholders claim that the Second Circuit "bypassed clear statutory language in favor of crafting its own definition of 'purchase'" and thereby parted company with "other Circuit courts [which] have continued to interpret definitional terms [in the securities laws] based on their plain meaning." Cert. Pet. at 12, 14. This characterization of the lower court's decision is grossly inaccurate.

In the first place, the Bondholders' contention that the circuit court "judicially legislated a new definition" for the term "purchase" cannot be squared with the decision itself. *Id.* at 2. Nowhere in the court's discussion of Count II did it purport to define that term. To the contrary, as even a cursory review of the decision confirms, the Second Circuit's dismissal of that Count was based upon a strict, plain-language reading of the term "issuer" in Section 16(b).

Moreover, even if the circuit court's decision could be viewed as implicitly propounding a definition of the term "purchase" that departs from 15 U.S.C. § 78c(a)(13), it would not have erred in doing so. Indeed, as this Court has repeatedly recognized, whether a specific transaction constitutes a Section 16(b) event in a given case depends upon whether it gives rise to the type of risk Congress enacted the statute to combat. *See, e.g., Reliance Elec. Co. v. Emerson Ele. Co.*, 404 U.S. 418, 424 n.6 (1972) ("Thus, in interpreting the terms 'purchase' and 'sale,' courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse."); *see also Kern County*, 411 U.S. at 595 (same).

The Bondholders' next argument—that Section 16(b) should be read broadly enough to cover transactions in the securities of multiple issuers because the Second Circuit's strict reading creates a "sizeable loophole in § 16(b) enforcement," Cert. Pet. at 15—fares no better. In its decision, the Second Circuit acknowledged that applying Section 16(b) according to its plain terms would, in certain circumstances, potentially permit insiders to circumvent the statute. As the court expressly recognized, however, Section 16(b) does not (and is not designed to) capture all conceivable forms of insider profiteering. In fact, an insider with non-public information need do nothing more complex to avoid the statute than allow six months and a day to elapse before engaging in a matching transaction. Similarly, a large shareholder could escape Section 16(b) simply by maintaining its beneficial shareholding in the issuer at 9.9%, just below the statutory threshold. Other possibilities abound, all of them more plausible than buying and selling third party companies which happen to hold the subject issuer's securities in their investment portfolios—a tactic that the Second Circuit aptly analogized to "speculating in tractors by buying a farm." Petitioner's App. A at 11a.

Nevertheless, the possibility that Section 16(b) can be "evaded" by insiders using various strategies (be they simple or convoluted) does not warrant the expansion of the statute beyond its strict terms. As the circuit court rightly noted, Section 16(b) "is simply not an antidote to all the ills that may plague the securities market." *Id.* at 12a (internal quotations omitted). Rather, the short-swing statute exists alongside other statutory regimes for combating insider trading: "[t]he more a transaction is crafted to evade section 16(b), the stronger the case [will be] for holding an insider liable under section 10(b)." *Id.* Accordingly, the fact that transactions such as those challenged in Count II do not fall within the scope of Section 16(b) is not a reason to expand the statute beyond its plain terms.

As such, the Bondholders' appeal to policy to expand the statute's scope to reach transactions not covered by its plain terms is misplaced. Indeed, as the Second Circuit has previously recognized, because Section 16(b) establishes strict liability within somewhat arbitrary parameters, policy considerations weigh in favor of *limiting*, rather than extending, the statute's reach. *See Gwozdzinsky v. Zell/Chillmark Fund, L.P.*, 156 F.3d 305, 310 (2d Cir. 1998) ("The statute, as written, establishes strict liability for all transactions that meet its mechanical requirements. When courts have looked to policy, it [has been] to avoid the sometimes harsh results of this inflexible rule.").

Finally, the countertextual and open-ended view of Section 16(b) advocated by the Bondholders (and correctly rejected by the Second Circuit) would lead a host of absurd and unreasonable results. Assume, for example, that Company A (a statutory insider with respect to Issuer X) owns a major stake in Company B, which holds a small number of Issuer X shares in its securities portfolio. Under the Bondholders' theory, if Company A simply bought additional shares of Company B, and then sold those shares within six months, those transactions would generate disgorgeable short-swing profits not only with respect to Company B stock, but also with respect to Issuer X shares. Moreover, these profits would be based on the difference in Issuer X share prices notwithstanding that there was never any actual transaction in Issuer X securities. The same holds true for any *other* issuer securities which Company B happened to hold in its portfolio, resulting in an endless sequence of Section 16(b) events relating to securities not actually traded.

In short, far from creating an "expandable loophole," the Second Circuit's adherence to the plain language of Section 16(b) ensures that the threat of its draconian penalties will not curtail legitimate business transactions about which Congress was plainly not concerned when it enacted the short-swing statute.

CONCLUSION

For the foregoing reasons, the Bondholders' petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 30, 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-CV

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC.,
COMCAST CORPORATION, COMCAST ONLINE
COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC.,
BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 4

I. THE ESTABLISHMENT OF THE PUTS IN MARCH 2000 CONSTITUTED A SALE OF AT HOME STOCK FOR PURPOSES OF SECTION 16(b) 4

II. THE MAY 2001 AGREEMENT TO CANCEL THE FIXED PRICE PUTS WAS A PURCHASE FOR SECTION 16(b) PURPOSES 9

III. COMCAST'S ACQUISITION OF THREE CABLE COMPANIES THAT OWNED AT HOME WARRANTS WAS NOT A PURCHASE OF THE WARRANTS FOR PURPOSES OF SECTION 16(b) 10

IV. THE "UNORTHODOX TRANSACTION DOCTRINE" IS INAPPLICABLE TO THE TRANSACTIONS IN THIS CASE 15

V. CONTROLLING DEFERENCE IS OWED BY THE COURT TO THE COMMISSION'S REASONABLE INTERPRETATIONS OF SECTION 16(b) AND RELATED COMMISSION RULES 16

A. This Court and the Supreme Court Have Repeatedly Held that a Court Is Bound by an Agency's Reasonable Interpretations of Its Own Regulations Provided in an *Amicus* Brief 16

TABLE OF CONTENTS—Continued

Page

B. This Court Should Accord *Chevron* Deference to Interpretations of the Federal Securities Statutes Provided in Commission *Amicus* Briefs 18

CONCLUSION 27

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(A)

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1): BRIEFS IN DIGITAL FORMAT

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES **Page**

Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461 (2004) 22
American Standard, Inc. v. Crane Co., 510 F.2d 1043 (2d Cir. 1974) 12
At Home Corporation v. Cox Communications, et al., 340 F. Supp. 2d 404 (S.D.N.Y. 2004) 2
Auer v. Robbins, 519 U.S. 452 (1997) 17, 18
Barnhart v. Walton, 535 U.S. 212 (2002) 17, 21, 23
Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988) 17
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 17, 18
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... 18, 19, 20, *passim*
Christensen v. Harris County, 529 U.S. 576 (2000) 20, 22
Community Health Center v. Wilson-Coker, 311 F.3d 132 (2d Cir. 2002) 23
Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25 (2d Cir.), *cert. granted*, 126 S. Ct. 34 (2005) 20, 23
DeMaria v. Andersen, 318 F.3d 170 (2d Cir. 2003) 17
Drake v. FAA, 291 F.3d 59 (D.C. Cir. 2002) 18
Ecarnacion v. Barnhart, 331 F.3d 78 (2d Cir. 2003) 18
In re Enterprise Mortgage Acceptance Co., LLC, Securities Litigation, 391 F.3d 401 (2d Cir. 2005) 20, 23
Foremost-McKesson, Inc. v. Provident Securities Co., 423 U.S. 232 (1976) 13
Gollust v. Mendell, 501 U.S. 115 (1991) 13

TABLE OF AUTHORITIES—Continued

Page

Gryl v. Shire Pharmaceuticals Group PLC., 298 F.3d 136 (2d Cir. 2002) 25
Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) ..... 11, 12, 14, *passim*
LaFleur v. Whitman, 300 F.3d 256 (2d Cir. 2002) 18
Levy v. Southbrook International Investments, Ltd., 263 F.3d 10 (2d Cir. 2001) 17, 25
Martin v. Occupational Safety & Health Rev. Com'n., 499 U.S. 144 (1991) 18
National Cable & Telecommunications Assoc. v. Brand X Internet Services, __ U.S. __, 125 S. Ct. 2688 (2005) 19
In re New Times Securities Services, Inc., 371 F.3d 68 (2d Cir. 2004) 24, 26
Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) 17
Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418 (1972) 12, 13
SEC v. American Board of Trade, Inc., 751 F.2d 529 (2d Cir. 1984) 14
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 19
Taylor v. Vt. Dep. of Educ., 313 F.3d 768 (2d Cir. 2002) 18
United States v. Mead Corp., 533 U.S. 218 (2001) 20, 22
Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) 22
Yoder v. Orthomolecular Nutrition Institute, Inc., 751 F.2d 555 (2d. Cir. 1985) 14
Yourman v. Giuliani, 229 F.3d 124 (2d Cir. 2000) 17

TABLE OF AUTHORITIES—Continued

COMMISSION RELEASES **Page**

Notice of Proposal to Adopt a Rule Exempting from the Operation of Section 16(b) Certain Acquisitions and Dispositions of Securities Pursuant to Mergers or Consolidations, Exchange Act Rel. No. 4696, 17 Fed. Reg. 3177, 1952 SEC LEXIS 63 (April 9, 1952) 13

Ownership Reports and Trading By Officers, Directors and Principal Securities Holders, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242 (Feb. 21, 1991) 4, 5, 18

STATUTES AND RULES

Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*

Section 3(a), 15 U.S.C. 78c(a) 15

Section 3(a)(10), 15 U.S.C. 78c(a)(10) 14

Section 3(a)(13), 15 U.S.C. 78c(a)(13) 10, 14

Section 16(b), 15 U.S.C. 78p(b) ..... 1, 2, 3, *passim*

Rules Under the Securities Exchange Act of 1934, 17 C.F.R. 240.01, *et seq.*

Rule 16a-1(c), 17 C.F.R. 240.16a-1(c) 5

Rule 16a-1(c) (6), 17 C.F.R. 240.16a-1(c) (6) 7

Rule 16a-1(h), 17 C.F.R. 240.16a-1(h) 5

Rule 16a-9, 17 C.F.R. 240.16a-9 25

Rule 16a-10, 17 C.F.R. 240.16a-10 25

Rule 16a-11, 17 C.F.R. 240.16a-11 25

Rule 16a-12, 17 C.F.R. 240.16a-12 25

Rule 16a-13, 17 C.F.R. 240.16a-13 25

Rule 16b-1, 17 C.F.R. 240.16b-1 25

Rule 16b-2, 17 C.F.R. 240.16b-2 25

Rule 16b-3, 17 C.F.R. 240.16b-3 25

Rule 16b-4, 17 C.F.R. 240.16b-4 25

Rule 16b-5, 17 C.F.R. 240.16b-5 25

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES (Continued) **Page**

Rule 16b-6, 17 C.F.R. 240.16b-6 25
Rule 16b-6(a), 17 C.F.R. 240.61b-6(a) 5, 9
Rule 16b-6(b), 17 C.F.R. 240.61b-6(b) 6
Rule 16b-6(d), 17 C.F.R. 240.16b-6(d) 8, 9
Rule 16b-7, 17 C.F.R. 240.16b-7 25
Rule 16b-8, 17 C.F.R. 240.16b-8 25

MISCELLANEOUS

David S. Ruder, Address: The Development of Legal Doctrine Through Amicus Participation: The SEC Experience, 1989 Wis. L. Rev. 1167 (1989) 26
H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934) 13
Request for Commission Amicus Participation in a Pending Case, http://www.sec.gov/litigation/briefs/amicusrequest.htm 26

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-cv

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC.,
COMCAST CORPORATION, COMCAST ONLINE
COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC.,
BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT

INTRODUCTION

The Securities and Exchange Commission submits this brief as *amicus curiae* in response to a request by the Court.

This action was brought by At Home Corporation ("At Home," "issuer," or "plaintiff") under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), to recover alleged short-swing profits obtained by insiders of At Home. The complaint alleges that defendants—Cox Communications, Inc., Comcast Corporation and their affiliates—sold and then purchased, or purchased and sold, At Home

equity securities within six months. The defendants are alleged to have acted as a group that owned more than 10 percent of At Home securities, and thus to be statutory insiders of At Home. The suit seeks recovery of profits the defendants allegedly realized on these short-swing trades. The district court dismissed plaintiff's Section 16(b) claims. *See At Home Corporation v. Cox Communications, et al.*, 340 F. Supp. 2d 404 (S.D.N.Y. 2004). The Commission agrees with the district court that defendants are not liable under Section 16(b).

BACKGROUND

At Home was founded by a number of cable companies in March 1995 to provide cable-based internet access to customers (Compl. ¶18). On March 28, 2000, the defendants, Cox and Comcast, entered into a letter agreement with AT&T ("agreement") in which Cox and Comcast acquired, respectively, a put to sell to AT&T up to $1.4 billion and $1.5 billion in At Home shares. Under the terms of the agreement, Cox and Comcast could sell each share for the higher of (1) $48 or (2) a floating average market price at the time of exercise (A-133; Compl. ¶45).

Defendants notified AT&T of their intention to exercise their puts on January 11, 2001. At that time, At Home's shares were selling for an average $7.72 per share (Compl. ¶53). Accordingly, defendants' notices to AT&T stated that the defendants "assumed" that the purchase price would be $48 per share (A-165, 168). AT&T did not want the shares. AT&T and the defendants entered into a new agreement on May 18, 2001 whereby the defendants canceled their puts in exchange for 155.3 million shares of AT&T stock worth $3.43 billion (Compl. ¶56).

The plaintiff alleged that Cox and Comcast sold At Home shares for purposes of Section 16(b) on January 11, 2001, when they provided notice of their intent to exercise the

puts.[1] This was within six months of the May 18, 2001 agreement to rescind the puts, which plaintiff contended was a purchase of At Home securities. The district court agreed that the rescission was a purchase, but held that the earlier sale occurred on March 28, 2000, when the puts were established, so that the sale and purchase took place more than six months apart, and were thus not subject to Section 16(b).

The plaintiff alternatively claimed that if the sale occurred on March 28, 2000, Comcast made matching purchases when, between January and August 2000, it acquired three cable companies that held At Home securities. The district court dismissed this claim, holding that these indirect acquisitions were not cognizable transactions under Section 16(b).

The plaintiff appealed, and this Court has sent a letter to the Commission inviting it to answer five questions. We address those questions in order.

ARGUMENT

I. THE ESTABLISHMENT OF THE PUTS IN MARCH 2000 CONSTITUTED A SALE OF AT HOME STOCK FOR PURPOSES OF SECTION 16(b).

The Court asks "[w]hether the establishment of the puts on March 28, 2000 constituted a sale of At Home securities for purposes of section 16(b) * * *." It did. Before 1991, the purchase or sale of securities underlying a derivative security occurred on the exercise of the derivative, rather than upon its creation. In 1991, the Commission noted that this left "open a significant potential for short-swing abuse in trading derivative securities." *Ownership Reports and Trading By*

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[1] Alternatively, the plaintiffs contended that the sales occurred on February 2, 2001, at the end of the 30 day period for determining if the fixed rate or the floating rate was higher.

Officers, Directors and Principal Securities Holders, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242, 7250 (Feb. 21, 1991). In that release, the Commission offered the following example:

> [A]n insider with knowledge of a positive material development, to be announced shortly, determines that while he wants to retain his existing equity position, he wants to take advantage of the information, so he purchases issuer warrants. After the public announcement and rise in the stock price the insider sells his common stock, obtaining a short-swing profit, knowing that he can replace the shares at a predetermined price since he holds the warrants. Under the former rules, he could simply wait six months and a day to exercise the warrants so the profit would not be subject to section 16(b) and not recoverable by the company.

Id. at 7250. Likewise, an insider who knows of impending negative information can negotiate a fixed price put, enabling it to sell, after the negative information is released and the price falls, at the higher price. The insider unfairly uses the inside information by fixing the price when the derivative is created, not when it is exercised.

In 1991, the Commission amended the rules so that the acquisition of a "derivative security" is also considered the acquisition of the underlying securities for purposes of Section 16(b). "[D]erivative security" was defined to mean "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security * * *." Rule 16a-1(c), 17 C.F.R. 240.16a-1(c). Rule 16b-6(a), 17 C.F.R. 240.16b-6(a), provides:

> The * * * establishment of or increase in a put equivalent position or liquidation of or decrease in a

> call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act * * *.

A "put equivalent position" is defined by Rule 16a-1(h), 17 C.F.R. 240.16a-1(h), to mean "a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position." A put with a fixed exercise price increases in value as the price of the underlying stock decreases because the spread between the market price and the fixed exercise price increases.

On the other hand, a floating price linked to the market price does not have that attribute. The 1991 rules draw a sharp distinction between fixed and floating prices. The Commission explained that "[r]ights without a fixed exercise price do not provide an insider the same kind of opportunity for short-swing profit since the purchase price is not known in advance." *Ownership Reports*, Exchange Act Rel. No. 28869, 56 Fed. Reg. at 7252. The Commission stressed that "[t]he opportunity to lock in a profit begins when the exercise price is fixed; at that time, the right becomes a derivative security subject to section 16." *Id.* Conversely, the later *exercise* of a derivative at its *previously* fixed price is exempt from Section 16(b) and has no Section 16(b) consequences. *See* Rule 16b-6(b), 17 C.F.R. 240.16b-6(b).

On the other hand, the Commission explained that:

> [A] right with a floating exercise price is not required to be reported and will not be deemed to be acquired or purchased, for section 16 purposes, until the purchase price of the underlying security becomes fixed or established, which commonly occurs at exercise. Thus, a right to purchase an equity security is deemed acquired as of the date the exercise or conversion price becomes fixed, and the acquisition, absent an exemption, would be

> matchable for section 16(b) purposes with a disposition within six months of the fixing of the price.

56 Fed. Reg. at 7253. "The primary potential for abuse [of inside information] arises at the time of exercise for a floating price derivative security because only at exercise is the price fixed and, therefore, the extent of the profit opportunity defined." Thus, "[b]y treating the exercise of the floating price derivative security as the 'acquisition' of the underlying security, the rules mitigate the incentives for insiders to abuse their informational advantage."[2]

In this case, the March 2000 agreement presented the defendants with puts with a fixed price of $48 paired with puts with a floating price based on a specified market average. In January 2001, with the market price far below $48, the defendants chose to exercise their puts at the fixed price. The opportunity to abuse inside information existed only at the time the fixed exercise price was set. If inside information is learned only after the fixed price is set, the information cannot be abused in later exercising at the fixed price. Because the fixed price was used in this case, the establishment of the puts is when the six month trading period should begin. The district court correctly concluded that the establishment of the puts in March 2000 constituted a sale of At Home stock under Section 16(b).

Plaintiff nevertheless argues that the hybrid security should be treated as a floating price derivative security, as though there were no fixed component. The cornerstone of plaintiff's contention is that, "in contrast to any other instrument in any other reported case of which we are aware, the **only** fixed component at issuance was not the number of shares or price per share, but the **total consideration** to be paid by the

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[2] This is reflected in Rule 16a-1(c)(6), 17 C.F.R. 240. 16a-1(c)(6), which excludes from the definition of a "derivative security" "[r]ights with an exercise or conversion privilege at a price that is not fixed."

grantor of the option (AT&T)." (Appellant's Brief p. 37 (emphases in original)). Thus, "[t]he only fact that all the parties to the Put knew on March 28, 2000 was that AT&T would pay a total of approximately $2.9 billion, but the number of shares and the price per share could not be known until after notice was given and the stock market determined the final price"(Appellant's Brief p. 37-38).

The district court correctly rejected this argument, pointing out that "[t]he specified maximum overall price of $2.9 million, when combined with the specified minimum per-share price of $48, dictated that defendants could sell, at most, 60.4 million shares.[3] Thus the initial agreement *did* limit the number of shares which AT&T would be required to buy." 340 F. Supp. 2d at 410 (emphasis in original).[4]

II. THE MAY 2001 AGREEMENT TO CANCEL THE FIXED PRICE PUTS WAS A PURCHASE FOR SECTION 16(b) PURPOSES.

The Court next asks whether the May 18, 2001 agreement—in which the defendants agreed not to exercise their puts—was a purchase for purposes of Section 16(b). The district court held that it was a purchase but that, since it occurred more than six months after the sale on March 28, 2000, the plaintiff's first claim should be dismissed. That is correct.

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[3] Since both the total and per share prices were fixed, the number of shares with respect to the fixed price component was fixed.

[4] Plaintiff also argues that the holding of the district court is unworkable in cases when the insider exercises a hybrid put at the floating rate because it would require there to be a second sale of the same underlying securities: "There could not be a 'second' sale, because according to the district court, **all** of the shares were deemed sold on March 28, 2000 at $48 per share * * *" (Appellant's Brief p. 37). This is incorrect. Where an insider exercises a hybrid put at the floating price, the fixed price put expires on an exempt basis by virtue of Rule 16b-6(d). The underlying shares become available for a different sale.

Under Rule 16b-6(a) the "liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) * * *." The May 2001 agreement explicitly cancelled what had been the defendants' put equivalent position. Rule 16b-6(d), 17 C.F.R. 240.16b-6(d), provides that "[t]he disposition or closing of a long derivative security position, as a result of cancellation or expiration, shall be exempt from section 16(b) of the Act *where no value is received* from the cancellation or expiration" (emphasis added). This agreement does not qualify for that exemption since Cox and Comcast did receive value in exchange for agreeing to forgo the right to exercise their puts.

Defendants nonetheless contend that "[a]fter the March 2000 Put was exercised on January 11, 2002, *there was no put to 'cancel'*" and that the "[c]ourts uniformly have held that 'once an option is exercised, *the option itself ceases to exist* and an enforceable bilateral contract is formed.'" (Brief of Appellee Cox p. 45 (emphases in original); *see also* Brief of Appellee Comcast pp. 38-39). Defendants' argument places semantics over substance: while the defendants gave notice of their intent to exercise the puts, they never, in fact, followed through and transferred any shares to AT&T.

III. COMCAST'S ACQUISITION OF THREE CABLE COMPANIES THAT OWNED AT HOME WARRANTS WAS NOT A PURCHASE OF THE WARRANTS FOR PURPOSES OF SECTION 16(b).

This Court's third question is "[w]hether Comcast's acquisition of three cable companies that owned warrants to purchase shares of At Home stock in January, March and August 2000 should be characterized as a § 16(b) purchase of At Home securities." Under Count II of their complaint, plaintiff urges that if, *arguendo*, as Comcast contends, the creation of the put in March 28, 2000 constituted a 'sale' for purposes of Section 16(b), then that sale can be matched with

Comcast's acquisition of the warrants, which took place within six months of March 28, 2000 (Appellant's Brief pp. 44-46; *See also* Compl. ¶ 74).[5] The plaintiff argues that "purchase," as defined by Section 3(a)(13) of the Exchange Act, 15 U.S.C. 78c(a)(13), includes "any contract to buy, purchase, or otherwise acquire" and that this definition is broad enough to include the purchase of another company that, in turn, owns securities of the issuer (Appellant's Brief pp. 44-46).

The district court held that these transactions are not within the scope of Section 16(b) because the acquisition of the warrants was an incidental part of acquisitions of the three companies. Without deciding whether this amounted to a "purchase" of securities for purposes of Section 16(b), the court held (340 F. Supp. 2d at 411):

> 'In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to inside information.' *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594 [ ] (1973). We can conceive of situations where an insider could acquire one company simply (or mainly) to obtain its interests in the subject company, as when the acquired company has few other assets or exists for the sole purpose of trading in shares of the subject company. However, plaintiff has failed to plead any facts giving rise to such a possibility here.

The district court was correct to find that this sort of indirect acquisition in a change-in-control transaction typically does not fall within the scope of Section 16(b). The

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[5] There are no allegations against Cox in Count II.

district court, however, incorrectly resolved the issue by use of *Kern*. The *Kern* Court held that a transaction that literally falls within the scope of Section 16(b) may, nevertheless, be excluded from the section if, on the facts of the case, it does not present a risk of speculative abuse. While the defendant in *Kern* was a greater than 10% owner of stock in the issuer, it also was an unsuccessful hostile tender offeror. To the Court, the critical factors in excluding the defendant from liability under Section 16(b) were that the defendant was forced to sell pursuant to a merger agreement, whose terms it did not negotiate, and, as a hostile tender offeror, the defendant did not have access to inside information. *See Kern*, 411 U.S. at 597-98. This Court has read *Kern* to require that the insider not have access to inside information and/or have no control over the terms of the transaction or its occurrence. *See American Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1054 (2d Cir. 1974). Here, defendant Comcast does not meet either of those criteria, and we believe *Kern* does not apply.

This case calls for a different approach. The acquisition of At Home warrants here was an indirect consequence of a change-in-control transaction. In general (although there can be exceptions, as we discuss below), this sort of indirect and incidental acquisition should be presumed not to be a "purchase" for purposes of Section 16(b), since it is not the sort of transaction Congress was concerned about. The Supreme Court has stated that "'the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great.'" *Kern*, 411 U.S. at 592 (*quoting Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 422 (1972)). As the Commission explained long ago, a six-month period was chosen because that "arbitrary period" was thought "as roughly marking the distinction between short swing speculation and long term investment." *Notice of Proposal to Adopt a Rule Exempting from the Operation of Section 16(b)*

Certain Acquisitions and Dispositions of Securities Pursuant to Mergers or Consolidations, Exchange Act Rel. No. 4696, 17 Fed. Reg. 3177, 1952 SEC LEXIS 63 (April 9, 1952).

Because Section 16(b) can be harsh in imposing strict liability, "Congress itself limited carefully the liability imposed by §16(b)." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 252 (1976).[6] "When Congress has so recognized the need to limit carefully the 'arbitrary and sweeping coverage' of §16(b) * * * courts should not be quick to determine that * * * Congress intended the section to cover a particular transaction." *Id.* at 252 (citations omitted). *See also Gollust v. Mendell*, 501 U.S. 115, 122 (1991); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934).

An insider who seeks to profit from inside information typically will engage in a purchase or sale in the issuer's securities, and then engage in an opposite-way transaction when the information becomes public, and the securities' price is affected. A change in control, however, is typically motivated by a desire to acquire control of a company. It also involves complex negotiations, and many strategic corporate considerations, and often involves regulatory review and approval. While it is not beyond possibility that an acquiror would tailor a change in control transaction to obtain short-swing profits from insider trading, it is certainly not going to be a common scenario. Good faith change in control transactions are not ones "in which the possibility of abuse [is] intolerably great," *Kern*, 411 U.S. at 592.

The plaintiff nonetheless argues that these acquisitions literally meet the words of the definition of "purchase" in Section 3(a)(13) of the Exchange Act. However, the prefatory language to the Exchange Act definitions states that they apply "[w]hen used in this title, unless the *context otherwise*

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[6] *See also Gollust v. Mendell*, 501 U.S. 115, 122 (1991); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. at 422-25.

requires." Section 3(a), 15 U.S.C. 78c(a) (emphasis added). This Court has "recognized the importance of this introductory phrase in certain situations." *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 559 (2d. Cir. 1985). For example, Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), excludes from the definition of "security" "any note * * * which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." In spite of this language, which would seem to exempt all notes of any quality, so long as of proper duration, this Court has long held, citing the context clause, that the exemption does not apply "literally," but only applies to notes that are the equivalent of commercial paper. *See, e.g., SEC v. American Board of Trade, Inc.*, 751 F.2d 529, 538 (2d Cir. 1984) (Friendly, J.).

Employment of the context clause is likewise appropriate here. As discussed above, Section 16(b) is a strict liability statute. The purpose of the provision must be taken into account when construing the Section 3(a) definitions of "purchase" and "sale" with respect to Section 16(b). Since a change in control transaction will rarely be used to engage in insider trading in securities held as an asset by the acquired company, this sort of indirect acquisition should presumptively be deemed not to be a purchase for purposes of Section 16(b) (or a sale by the prior owners of the company). We say "presumptively" because, as the district court noted, there may be circumstances where an insider uses the acquisition of another entity as a subterfuge in order to acquire underlying securities. The plaintiff, however, should bear the burden of pleading and proving that this indirect acquisition was such an exception, something the plaintiff has not done here.[7]

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[7] This does not mean, as might be thought, that Section 16(b) would cease to be a strict liability statute. It is a strict liability statute with respect to short-term transactions that are properly deemed purchases and sales

IV. THE "UNORTHODOX TRANSACTION DOCTRINE" IS INAPPLICABLE TO THE TRANSACTIONS IN THIS CASE.

This Court next asks "[w]hether the *Kern* 'unorthodox transaction' doctrine supports the District Court's dismissal of either of the relevant claims." As discussed in the prior section, we do not believe that the doctrine should be expanded to apply, as the district court did, to the claim based on indirect acquisition of At Home warrants in three change of control transactions.

Separately, Cox argues that dismissal of plaintiff's *first* cause of action should be affirmed because "[a]s in *Kern County*, AT&T 'undoubtedly knew more about' At Home than Cox at the time of the alleged 'purchase' and 'sale'" (Brief of Appellee Cox pp. 54-55, *citing Kern County*, 411 U.S. at 602). While this might be true, it is not a basis for applying *Kern*, which this Court has read to require lack of access to inside information and/or a forced transaction, neither of which existed here.

V. CONTROLLING DEFERENCE IS OWED BY THE COURT TO THE COMMISSION'S REASONABLE INTERPRETATIONS OF SECTION 16(b) AND RELATED COMMISSION RULES.

The Court asks "[w]hat deference, if any, this Court owes the positions the SEC adopts in its *amicus curiae* brief." This actually presents two questions: (1) what deference is owed to the Commission's construction of its own rules in an *amicus* brief; and (2) what deference is owed to the Commission's construction of the federal securities statutes provided in an *amicus* brief.

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for purposes of the statute. The inquiry here is whether a purchase was involved.

A. This Court and the Supreme Court Have Repeatedly Held that a Court Is Bound by an Agency's Reasonable Interpretations of Its Own Regulations Provided in an *Amicus* Brief.

The deference accorded by the courts to the Commission's interpretations of its own rules in an *amicus* brief is settled law. This Court has repeatedly held that it is "'bound by the SEC's interpretations of its regulations in its *amicus* brief, unless they are 'plainly erroneous or inconsistent with the regulation[s].'" *DeMaria v. Andersen*, 318 F.3d 170, 175 (2d Cir. 2003) and *Levy v Southbrook International Investments, Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001) (*both cases quoting Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000)). *Accord Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir. 2000) (deferring to an interpretation of regulations submitted in an *amicus* brief by the Secretary of Labor). In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Supreme Court first established the principle that an agency's interpretation of one of its own regulations commands substantial judicial deference such that the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

More recently, the principle was reinforced in *Auer v. Robbins*, 519 U.S. 452 (1997), where petitioner complained that an agency's interpretation of a regulation came in the form of an *amicus* brief. The Supreme Court declared, "[t]hat does not, in the circumstances of this case, make it any less worthy of deference" because the agency's "position is in no sense a '*post hoc* rationalizatio[n]' advanced by [the] agency seeking to defend past agency action against attack" 519 U.S. at 462 (*quoting Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). "There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id. See also*

Barnhart v. Walton, 535 U.S. 212, 217 (2002) (reaffirming *Auer*). As this Court has explained:

> [W]e recognized that an agency's interpretation of its own regulations is entitled to considerable deference, irrespective of the formality of the procedures used in formulating the interpretations. *See Taylor v. Vt. Dep. of Educ.*, 313 F.3d 768, 779-80 (2d Cir. 2002) (*citing Auer v. Robbins* [*supra*, at 461]); *LaFleur v. Whitman*, 300 F.3d 256, 277 (2d Cir. 2002)). We defer to an agency's interpretation of its own regulations because we 'presume that the power authoritatively to interpret [the agency's] own regulations is a component of the agency's delegated lawmaking powers.' *Martin v. Occupational Safety & Health Rev. Com'n.*, 499 U.S. 144, 151 [] (1991).

Ecarnacion v. Barnhart, 331 F.3d 78, 86 (2d Cir. 2003).[8] In light of the well established law in the Supreme Court and this Court, the Commission's interpretations of its rules expressed in this brief are binding, unless they are plainly erroneous or inconsistent with the regulations.

B. This Court Should Accord *Chevron* Deference to Interpretations of the Federal Securities Statutes Provided in Commission *Amicus* Briefs.

The Court also owes controlling deference to the Commission's interpretation of the statute—Section 16(b)—provided in this *amicus* brief. The analysis of this question

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[8] There are three preconditions for applying *Bowles or Auer* deference: the language of the regulation in question must be ambiguous; there must be no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question; and the agency's reading of its regulation must be fairly supported by the text of the regulation itself. *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002) (citations omitted).

begins with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the Supreme Court has recently summarized:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866, 81 L. Ed. 2d 694, 104 S. Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Id.* at 843-844, and n. 11, 104 S. Ct. 2778.

National Cable & Telecommunications Assoc., v. Brand X Internet Services, __ U.S. __, 125 S.Ct. 2688, 2699 (2005).[9]

For an agency interpretation to receive *Chevron* deference, the agency must have been entrusted by Congress with authority to interpret the statute, the statute must be ambiguous and subject to interpretation, and the agency's interpretation must be a reasonable one. The term "purchase" as applied to Section 16(b) is ambiguous. Congress has entrusted the Commission with responsibility for resolving ambiguities in light of the purpose of the statute. Section 16(b) provides that "[t]his subsection shall not be construed

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[9] Prior to *Chevron*, the Court held in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that the "rulings, interpretations and opinions of" an agency that do not constitute an exercise of lawmaking authority, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment" which are "entitled to respect" to the extent they are persuasive. *Id.* at 140.

to cover * * * any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." As this shows, Congress did not believe Section 16(b) was self-explanatory and vested the Commission with authority to identify the purpose of the statute and identify transactions which do not contravene the section's purpose.[10]

The Commission has generally done that through rulemaking. However, rulemaking is not a prerequisite for the Commission's views to be accorded *Chevron* deference. While earlier cases focused on the formality of an agency decision, such as whether it was the product of notice and comment rulemaking or of an adjudication, *see Christensen v. Harris County*, 529 U.S. 576, 587 (2000), more recent cases have focused on whether the interpretation is the product of authoritative agency consideration. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court addressed the level of deference to be accorded to Customs Service tariff classifications contained in "letter rulings." The court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise

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[10] In two recent cases, this Court declined to give *Chevron* deference to Commission *amicus* briefs because the statutes at issue did not explicitly look to the Commission to fill in interstices in the statutes. *See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34 n.6 (2d Cir.), *cert. granted.*, 126 S. Ct. 34 (2005) (Mem.) (construing provision of Securities Litigation Uniform Standards Act preempting state law securities fraud actions); *In re Enterprise Mortgage Acceptance Co., LLC, Securities Litigation*, 391 F.3d 401, 410 n.8 (2d Cir. 2005) (construing provision in Sarbanes-Oxley Act modifying statutes of limitation in private securities lawsuits). Whatever the merit of those decisions as to those statutes, this case involves a statute, Section 16(b), in which Congress expressly delegated to the Commission that responsibility.

of that authority." *Id.* at 226-27. While the Court noted that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of noticeand-comment rulemaking or formal adjudication," the Court added:

> That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.

Id. at 230-31. The Court held that "[t]he fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*," *Id.* at 231. The opinion, however, gives little conclusive guidance as to what must be shown, since the Court held that the authorities cited to it—letter rulings issued by 46 different scattered Customs offices—were obviously not authoritative agency positions. *See id.* 233.

The next year, however, in *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court achieved some clarity by stating flatly that an agency interpretation may be entitled to *Chevron* deference even when it is neither the product of notice-and-comment rulemaking nor has the force of law. The major factor the Court looked to is the level of *careful consideration an agency has given the question*. *See* 535 U.S. at 222. In *Barnhart* the petitioner, whose application for benefits was denied by the Social Security Administration, asked the Court to disregard the agency's interpretation found in recently promulgated regulations. The Court noted that the interpretation in fact was a "long standing" one and "the fact the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking * * * does not automatically deprive that interpretation of the judicial deference otherwise due" under *Chevron*. 535 U.S. at 221

(citations omitted). Then, turning its attention to the confusion caused by *Christensen* and *Mead*, the Court stated:

> If this Court's opinion in Christensen * * * suggested an absolute rule to the contrary, our later opinion in *United States v. Mead* * * * denied the suggestion. * * * Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking. * * * It indicated that whether a court should give such deference depends in significant part upon the interpretative method used and the nature of the question at issue.

535 U.S. at 221-222 (citations omitted).[11] The Court went on to conclude (*id.* at 222):

> In this case the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue. * * *

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[11] As this makes clear, not every informal statement of agency position is to be accorded *Chevron* deference. The Supreme Court has since declined to accord such deference to internal agency guidance, such as that "presented in internal guidance memoranda," *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 487 (2004), and an internal operating manual, *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003). We believe that the public position articulated here by the Commission itself, with the deliberative process undertaken to reach its position and the explanation of the reasons for that position, is more akin to the sort of articulations contained in rulemaking than it is to internal guidelines.

Later that year, this Court construed Barnhart to mean:

> Less formal interpretations may also be entitled to mandatory deference, depending upon to what extent the underlying statute suffers from exposed gaps in its policies, especially if the statute itself is very complex, as well as on the agency's expertise in making such policy decisions, the importance of the agency's decisions to the administration of the statute, and the degree of consideration the agency has given the relevant issues over time. *See Barnhart v. Walton*, 535 U.S. 212, 122 S. Ct. 1265, 1272, 152 L. Ed. 2d 330 (2002).

Community Health Center v. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002).[12]

The only statutory interpretation in this brief is whether Section 16(b) applies to a transaction where an insider acquires securities of an issuer indirectly by acquiring ownership of a third party company which, in turn, owns securities of the issuer. This is precisely the sort of question that Congress directed the Commission to deal with. Section 16(b) states that it will not apply to transactions which the Commission exempts as not within the purpose of the statute. Because the statute imposes strict liability, the Commission's role in determining when to exempt transactions is of critical importance to application of the statute. Congress and the Supreme Court have been clear that this is a statute which the Commission should assure is not unduly broad. This is, in short, precisely the sort of interstitial issue where *Chevron* deference is due the Commission's informal conclusions; "the

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[12] In *Dabit* and *Enterprise Mortgage*, this Court later cited *Mead* for the proposition that Commission views expressed in an *amicus* brief, rather than a rule or regulation, cannot receive *Chevron* deference. That position appears contrary to the Supreme Court's decision in *Barnhart* and this Court's decision in *Community Health Center*.

statute itself is very complex", the Commission has long and broad "expertise in making such policy decisions," and "the importance of the agency's decisions to the administration of the statute" is critical.

The only reason to consider not according conclusive deference to the Commission's position might be that it is not a "long-standing" one. That, however, is only true in the limited sense that the claim that the indirect acquisitions are within the scope of Section 16(b) is itself an apparently novel claim. The Commission should not have to envision every novel claim that might be made under Section 16(b) and analyze these hypothetical claims, before its views will be deemed authoritative.[13]

In a broader sense, moreover, the analysis here is closely similar to the sort of analysis the Commission has repeatedly engaged in for many years. The Commission has over the decades analyzed which transactions do not present risk within the purposes of Section 16(b).[14] Consistent with its rulemaking authority, the Commission has emphasized in both rules and *amicus* briefs that liability should exist only in situations where there is a real risk of insider trading.[15]

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[13] In *In re New Times Securities Services, Inc.*, 371 F.3d 68, 80-83 (2d Cir. 2004), this Court appeared to recognize that a Commission *amicus* brief might be entitled to Chevron deference, but declined to give it such deference because of the Commission's failure to previously address an issue even though it was longstanding. The Court also noted the presence of a competing view by an entity that administers the provision on a day to day basis, and the relation of the Commission to that entity. None of those facts exist in this case.

[14] *See, e.g., Rules* 16a-9 through 13 and 16b-1 through 16b-8, 17 C.F.R. 240.16a-9 to 16a-13 and 16b-1 to 16b-8.

[15] *See, e.g., Ownership Reports and Trading By Officers, Directors and Principal Securities Holders*, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242, 7252 (Feb. 21, 1991); *Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of the Appellee on Issues Addressed*, at 23-24; *Levy v. Southbrook International Investments, Ltd*, 263 F.3d 10

The Commission's *amicus* position here satisfies the other requirements for *Chevron* deference. It is the product of careful consideration, and is the authoritative view of the Commission itself, not merely staff views. The Commission's Office of the General Counsel posted to the Commission's Web site a statement regarding consideration of *amicus* briefs. In relevant part, it states that after a request is made:

> The Office of the General Counsel will review the materials submitted and seek input from Divisions and Offices of the Commission that may have an interest in the case. In cases where further review is appropriate, the staff generally will contact both sides and offer them the opportunity to make further submissions in writing, in person, or by telephone. If the staff determines that *amicus* participation is merited in a particular case, the Office of the General Counsel will make a recommendation, together with interested Divisions and Offices, to the Commission. The Commission then considers and votes on whether to accept the recommendation and file a brief. This process can take a significant amount of time.

Request for Commission Amicus Participation in a Pending Case, posted at http://www.sec.gov/litigation/briefs/amicus request.htm. *Amicus* briefs submitted by the Commission thus represent the views of the Commission. *See e.g.*, David S. Ruder, *Address: The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 Wis. L. Rev. 1167 (1989). All of these steps were taken in this case.[16]

(2d Cir. 2001); *Brief of the Securities and Exchange Commission, Amicus Curiae* at 13-14, *Gryl v. Shire Pharmaceuticals Group PLC.*, 298 F.3d 136 (2d Cir. 2002).

[16] The Commission's staff had detailed meetings with both sides' counsel, made further inquiries of them and received responses, and prepared a detailed written analysis and recommendation. The Commission reviewed

Even when denying deference to a Commission *amicus* brief on other grounds, this Court has said it had "no reason to doubt that the SEC's interpretation was the product of careful consideration." *In re New Times Securities Services, Inc.*, 371 F.3d at 82.

The statutory interpretation in this brief is an authoritative and fully considered position by the Commission, which reasonably construes an ambiguous statutory provision whose interpretation was explicitly entrusted by Congress to the Commission. We believe that the views expressed in this brief are entitled to Chevron deference.

CONCLUSION

The judgment of the district court should be affirmed and the positions of the Commission urged above should be adopted by the Court.

Respectfully submitted,

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February, 2006

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the recommendation for three weeks, met and discussed it, and then voted to authorize the brief. It also reviewed the brief itself.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-cv

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC.,
COMCAST CORPORATION, COMCAST ONLINE
COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC.,
BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

I certify that THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT complies with the type-volume requirements of Rules 32(a)(7)(B) and 29(d) of the Federal Rules of Appellate Procedure (F.R.A.P.) because it contains 6988 words. I further certify that this brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in proportionally-spaced typeface using WordPerfect (version 11) in garamond 14-point font size.

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Defendants-Appellees.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1): BRIEFS IN DIGITAL FORMAT

I certify that THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT, as submitted in digital format, has been scanned for viruses using McAfee VirusScan version 8.0 with signature 4692 of February 8, 2006 and that no viruses have been detected as required by Local Rule 32(a)(1).

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CERTIFICATE OF SERVICE

I, Allan A. Capute, am a member of the bars of Maryland and the District of Columbia, and I hereby certify that on 9th day of February, 2006, I caused to be served two copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT, to counsel for the parties of record at the address below, by overnight Federal Express:

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APPENDIX B

SEC Rule 16b-6(b) (17 C.F.R. § 240.16b–6(b))

The closing of a derivative security position as a result of its exercise or conversion shall be exempt from the operation of section 16(b) of the Act, and the acquisition of underlying securities at a fixed exercise price due to the exercise or conversion of a call equivalent position or the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act: *Provided, however*, That the acquisition of underlying securities from the exercise of an out-of-the-money option, warrant, or right shall not be exempt unless the exercise is necessary to comport with the sequential exercise provisions of the Internal Revenue Code (26 U.S.C. 422A).

No. 06-147

IN THE

Supreme Court of the United States

AT HOME CORPORATION,
Petitioner,

v.

COX COMMUNICATIONS, INC., COX @HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS, AND DAVID M. WOODROW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS COX COMMUNICATIONS, INC. AND COX @HOME, INC.'S BRIEF IN OPPOSITION

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(3)

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit properly hold that, under Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78p(b)), the Complaint failed to plead the required "matching" purchase and sale of At Home Corporation ("At Home") stock within a period of less than six months by Cox Communications, Inc. and Cox @Home, Inc. (collectively, "Cox") where: (a) the relevant Securities and Exchange Commission ("SEC") regulations provide that a put option exercised solely at its fixed price component (like the put option at issue here) can give rise to a Section 16(b) "sale" only on the date that it is established; and (b) the establishment date of the put was more than thirteen months before the alleged matching purchase?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents Cox Communications, Inc. ("CCI") and Cox @Home, Inc. ("Cox @Home") state that, through Cox Holdings, Inc. and Cox DNS, Inc., CCI is an indirect wholly-owned subsidiary of Cox Enterprises, Inc., which is a privately held corporation. Cox @Home is a wholly-owned subsidiary of CCI.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

BRIEF IN OPPOSITION 1

I. PERTINENT STATUTORY AND REGULATORY PROVISIONS 4

II. STATEMENT OF THE CASE 5

A. Allegations Of The Complaint 5

B. Transfer And Dismissal Of The Action 7

C. The SEC Determines That The District Court Should Be Affirmed 9

D. The Second Circuit Affirms The District Court 11

III. REASONS THAT THE PETITION SHOULD BE DENIED 12

A. There Is No Circuit Split Or Issue Of Widespread Application In This Case Demanding The Court's Attention 13

B. The Second Circuit Correctly Determined That The Only Section 16(b) Sale Occurred On The March 2000 Put's Establishment Date 14

C. The Bondholders Present No Valid Basis To Reverse The Second Circuit 20

CONCLUSION 26

APPENDIX A 1a

APPENDIX B 35a

TABLE OF AUTHORITIES

CASES **Page**

At Home Corp. v. Cox Commc'ns, Inc., Civ. A. No. 02-1486-JJF, 2003 WL 22350925 (D. Del. Oct. 8, 2003) 8
At Home Corp. v. Cox Commc'ns, Inc., 340 F. Supp. 2d 404 (S.D.N.Y. 2004) ..... *passim*
At Home Corp. v. Cox Commc'ns, Inc., 446 F.3d 403 (2d Cir. 2006) ..... *passim*
Auer v. Robbins, 519 U.S. 452 (1997) 19
Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 11
Cioffi v. Averill Park Central Sch. Dist. Bd. of Educ., 444 F.3d 158 (2d Cir. 2006) 22
City of Springfield, Mass. v. Kibbe, 480 U.S. 257 (1987) 20, 22
Davenport v. Harry N. Abrams, Inc., 249 F.3d 130 (2d Cir. 2001) 20, 22
Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) 25
Lerner v. Millenco, L.P., 23 F. Supp. 2d 337 (S.D.N.Y.), *recon. denied*, 23 F. Supp. 2d 345 (S.D.N.Y. 1998) 8
Levy v. Clearwater Fund IV, Ltd.., No. Civ. A. 99-004-SLR, 2000 WL 152128 (D. Del. Feb. 2, 2000) 8
Levy v. Oz Master Fund, Ltd., No. Civ. 7148, 2001 WL 767013 (S.D.N.Y. July 9, 2001) 8, 15
Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) 19
Schaffer v. CC Invs., LDC, 280 F. Supp. 2d 128 (S.D.N.Y.), *recon. granted in part*, No. 99-2821, 2003 WL 22480052 (S.D.N.Y. Oct. 31, 2003) 8, 23

TABLE OF AUTHORITIES—Continued

STATUTES **Page**

15 U.S.C. § 78p(b) (Securities Exchange Act of 1934, Section 16(b)) ..... *passim*
28 U.S.C. § 1367(c) 5

RULES AND REGULATIONS

17 C.F.R. § 240.16a-1(c) (SEC Rule 16a-1(c)) 4, 9
17 C.F.R. § 240.16a-1(h) (SEC Rule 16a-1(h)) ... 4, 10, 14
17 C.F.R. § 240.16b-6(a) (SEC Rule 16b-6(a)) ..... *passim*
17 C.F.R. § 240.16b-6(b) (SEC Rule 16b-6(b)) .... *passim*
SUP. CT. R. 10(c) 12

OTHER AUTHORITIES

Brief Of The Securities And Exchange Commission, *Amicus Curiae*, Submitted To The Second Circuit Court of Appeals on February 9, 2006 ..... *passim*
Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Exchange Act Release No. 28,869, 56 Fed. Reg. 7242 (Feb. 21, 1991) 9, 16

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS COX COMMUNICATIONS, INC. AND COX @HOME, INC.'S BRIEF IN OPPOSITION

This case involves an unfounded attempt by former At Home bondholders (the "Bondholders")—to whom that defunct corporation's claims were transferred—to manufacture liability against Cox under the federal short-swing profits statute, i.e., Section 16(b) of the Securities Exchange Act of 1934. Section 16(b) imposes liability against a corporate insider *only if* the insider engages in a "matching" purchase *and* sale of company securities *within a period of less than six months*. The Second Circuit, the Southern District of New York, and the SEC (in an *amicus curiae* brief requested by the Second Circuit) each properly determined that the Bond-

holders' Section 16(b) claims should be dismissed as a matter of law because the Bondholders failed to plead that Cox engaged in matching transactions in At Home stock within the proscribed time period.

The "hybrid" put option in this case (i.e., an option to sell with both a fixed and a floating price component[1]) granted Cox the right to sell its shares of At Home stock to At Home's controlling stockholder, AT&T Corp. ("AT&T"), at the greater of the fixed price of $48 a share or a floating market price. This put option (the "March 2000 Put" or "Put") was established on March 28, 2000, and its subsequent exercise price was *solely* its $48 *fixed* price. The Second Circuit, the Southern District of New York, and the SEC each agreed that SEC rules require that the Put be treated as a Section 16(b) sale solely on its *establishment* date (when the primary potential for abuse of the option existed), and not, as the Bondholders argued below, on or after the Put's subsequent exercise date. Because the only conceivable matching "purchase" in this case occurred on May 18, 2001—*well over six months after* the March 28, 2000 deemed sale date—the courts below held that the Bondholders failed to state a claim against Cox.

As explained in more detail below, the Bondholders' petition for *certiorari* should be denied. First, there is no

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[1] A put option is an option that gives its holder the right, but not the obligation, to sell shares of stock to the other party to the put at a price determined by the option's terms. In the case of a hybrid option, whether the option is exercised at the fixed or the floating component depends upon the market price of the underlying security. Where a hybrid put option contains a provision (like the put in this case) specifying that the exercise price will be the greater of the fixed price or the floating price, the fixed price component necessarily sets a minimum price. If the market price following exercise (at the time of the closing of the floating component's market pricing window) is below the price set in the fixed component (as here), then the exercise price of the hybrid put option will be the fixed price.

circuit split regarding the issues addressed in the Second Circuit's opinion; the Second Circuit is the only appellate court to have addressed the Section 16(b) treatment of a hybrid security. Further, there is no disagreement between the SEC (the agency charged with administering Section 16) and the Second Circuit, as the SEC also concluded in its *amicus* brief that the District Court's dismissal order should be affirmed.

Second, the Second Circuit's opinion was correct and, indeed, was required by the relevant SEC regulations governing the Section 16(b) treatment of derivative securities. Those regulations were designed to serve Section 16(b)'s statutory purpose of preventing corporate insiders from making short-swing profits by using non-public information. The SEC amended its regulations in 1991 to close an easily-exploitable loophole, which the Bondholders' position in the courts below would have reopened.

Finally, the Bondholders' remaining arguments for granting *certiorari* are meritless, including their newly raised "dual sale" argument that is the focus of their petition. Before this Court, the Bondholders have abandoned (and indeed do not even mention) the argument that they unsuccessfully presented to the Second Circuit, the District Court, and the SEC. Specifically, the Bondholders argued (and pled in their Complaint) that the March 2000 Put was a sale *only* after it was exercised in January 2001, and that it could not be treated as a sale on its March 28, 2000 establishment date. The Bondholders now *concede* that the Put's establishment was a sale, but also argue that a *second* sale should be recognized as a result of the Put's exercise. This new "dual sale" argument was never properly raised below, and is directly contrary to SEC regulations. In fact, the SEC explained in its *amicus* brief that the exercise of a hybrid put at a fixed price is *not* a Section 16(b) sale under its rules.

I. PERTINENT STATUTORY AND REGULATORY PROVISIONS

- Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b):

  For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) . . . within any period of less than six months, . . . shall inure to and be recoverable by the issuer . . .

- SEC Rule 16a-1(c), 17 C.F.R. § 240.16a-1(c):

  The term derivative securities shall mean any option . . . with an exercise or conversion privilege at a price related to an equity security . . . , but shall not include: . . .

  (6) Rights with an exercise or conversion privilege at a price that is not fixed . . . .

- SEC Rule 16a-1(h), 17 C.F.R. § 240.16a-1(h):

  The term put equivalent position shall mean a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position.

- SEC Rule 16b-6(a), 17 C.F.R. § 240.16b-6(a):

  [T]he establishment of or increase in a put equivalent position . . . shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act . . . .

- SEC Rule 16b-6(b), 17 C.F.R. § 240.16b-6(b):[2]

  The closing of a derivative security position as a result of its exercise . . . shall be exempt from the operation of section 16(b) of the Act, and the . . . disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act . . . .

II. STATEMENT OF THE CASE

The Bondholders have petitioned for a writ of *certiorari* for review of the Second Circuit's decision affirming the Southern District of New York's dismissal with prejudice of the Bondholders' Section 16(b) claims. The courts below held that the sole Section 16(b) claim asserted against Cox (the first cause of action) failed to plead that Cox engaged in a "matching" purchase and sale of At Home stock within a period of less than six months, and thus did not state a Section 16(b) claim against Cox. *See At Home Corp. v. Cox Commc'ns., Inc.*, 340 F. Supp. 2d 404, 410 (S.D.N.Y. 2004) (Pet. App. 17a-30a), *aff'd*, 446 F.3d 403 (2d Cir. 2006) (Pet. App. 1a-13a).

A. Allegations Of The Complaint.

The sole Section 16(b) cause of action against Cox[3] alleges that Cox's January 2001 *exercise* of the March 2000 Put

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[2] The Bondholders omitted this rule from their appendix, and therefore Cox has included it in its appendix. *See* Cox App. 35a.

[3] The Bondholders also named as defendants Comcast Corporation, Comcast Online Communications, Inc. and Comcast PC Investments, Inc. (collectively "Comcast") and Brian L. Roberts, as well as David M. Woodrow, a former Cox executive and former At Home director. In addition to the Section 16(b) claims against Cox and Comcast, the Bondholders also asserted a state law fiduciary duty claim against all defendants, which the District Court dismissed without prejudice on December 3, 2004 pursuant to 28 U.S.C. § 1367(c).

constitutes a "sale" of At Home stock that can be matched with an alleged purchase, i.e., Cox's subsequent entry into a Share Issuance Agreement with AT&T on May 18, 2001, to create liability under Section 16(b). Although Cox owned only approximately 8.3% of At Home's Series A common stock when the Put was established on March 28, 2000, the Complaint alleges that Cox is nevertheless subject to Section 16(b) as a statutory insider because Cox and Comcast together purportedly held a greater than 10% stock ownership stake as a "group." Compl. ¶¶ 11-12, Pet. App. 39a.

As the Complaint concedes, the Put contained a "hybrid pricing mechanism" (Compl. ¶ 54, Pet App. 53a) that, at any time from January 1, 2001 through June 4, 2002, allowed Cox to require AT&T to purchase up to approximately $1.4 billion of At Home stock from Cox at the greater of:

- the fixed price of "$48 per share" (Compl. ¶ 45, Pet. App. 49a); or
- "the average per share trading price of At Home common stock" over a specified period before and after the exercise date (the "floating component's market pricing window") (*id.*).

The March 2000 Put capped the maximum consideration that Cox could receive from AT&T at approximately $1.4 billion, which was the amount payable to Cox if it sold all its At Home shares to AT&T at the fixed price of $48 a share. Compl. ¶¶ 11, 44, Pet. App. 39a, 49a. Thus, the Put's fixed price component allowed Cox to sell a fixed number of shares to AT&T at $48 per share. *Id.* ¶ 45, Pet. App. 49a. Even if the Put's exercise price were a higher floating price, Cox would still receive the same amount of total consideration, but would be able to sell fewer shares to AT&T than under the fixed price component. *Id.*[4]

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[4] The March 2000 Agreements provided Comcast with essentially the same put right, although the Comcast put had a higher total consideration

On January 11, 2001, CCI exercised the Put and notified AT&T of its election to sell all the At Home common stock, owned directly or indirectly by it or Cox @Home, to AT&T. Compl. ¶ 52, Pet. App. 52a. Because the average market price during the relevant period was less than $48 per share,[5] the exercise price for Cox's At Home stock was solely the fixed price of "$48 per share pursuant to the [Put's] hybrid pricing mechanism." *Id.* ¶ 54, Pet. App. 53a.

The Complaint alleges that the purported matching "purchase" occurred on or about May 18, 2001, when AT&T and Cox entered into an agreement (the "Share Issuance Agreement"), pursuant to which Cox would retain its At Home stock and AT&T would be deemed to have satisfied the March 2000 Put in full. Compl. ¶ 56, Pet. App. 53a.[6] Cox entered into this Share Issuance Agreement *over thirteen months after* the establishment of the March 2000 Put on March 28, 2000. *Id.* ¶¶ 43, 56, Pet. App. 49a, 53a.

B. Transfer And Dismissal Of The Action.

The Bondholders originally filed this action in the United States District Court for the District of Delaware. On September 24, 2002, that court held that the Bondholders had "engage[d] in forum shopping [by] attempting to force this

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limit (and therefore under the fixed price component a higher number of shares).

[5] At Home stock closed at "$7.72 per share" on January 11, 2001, and at "$6.00 per share" on February 2, 2001. Compl. ¶¶ 53, 54, Pet. App. 53a.

[6] The Bondholders contended that the Share Issuance Agreement constituted a cancellation of the March 2000 Put (Compl. ¶¶ 55, 56, Pet. App. 53a), which they claimed was a deemed purchase pursuant to Rule 16b-6(a). The defendants disputed that the Put was cancelled, asserting that after its exercise, the Put ceased to be a unilateral option contract within the scope of Rule 16b-6(a), and instead became a bilateral contract. Neither court below ruled on this issue.

case into the District of Delaware,"[7] and transferred the action to the Southern District of New York. *At Home Corp. v. Cox Commc'ns Inc.*, Civ. A. No. 02-1486-JJF, 2003 WL 22350925, at *2 (D. Del. Oct. 8, 2003).

Following the transfer, Cox and Comcast moved to dismiss the Section 16(b) causes of action against them. On August 12, 2004, the District Court granted defendants' motions. Relying upon three prior Southern District of New York cases that had decided the Section 16(b) issue presented in the first cause of action in a manner favorable to defendants,[8] the District Court dismissed that claim. It held that the March 28, 2000 establishment of the Put was "the only sale-equivalent event" pled in the Bondholders' Complaint. Recognizing that this event "occurred more than six months before the only conceivable purchase" on May 18, 2001, the District Court ruled that the Bondholders' first cause of action failed to state a Section 16(b) claim against Cox and Comcast. Pet. App. 27a.[9]

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[7] The Bondholders originally filed in Delaware in hopes of availing themselves of a District of Delaware case, *Levy v. Clearwater Fund IV, Ltd.*, No. Civ. A. 99-004-SLR, 2000 WL 152128 (D. Del. Feb. 2, 2000). That case ignored the importance of the fixed price component of a hybrid put and has now been thoroughly discredited by the SEC in its *amicus* brief, the Second Circuit, and multiple cases in the Southern District of New York. *See* cases cited n.8 *supra*. The Bondholders have now abandoned their reliance on this inapposite decision, which dealt with the exercise of a hybrid option at a *floating price* (unlike here) and, in any event, does not support the Bondholders' new "dual sale" argument.

[8] *See Lerner v. Millenco, L.P.*, 23 F. Supp. 2d 337 (S.D.N.Y.), *recon. denied*, 23 F. Supp. 2d 345 (S.D.N.Y. 1998); *Levy v. Oz Master Fund, Ltd.*, No. Civ. 7148, 2001 WL 767013 (S.D.N.Y. July 9, 2001); *Schaffer v. CC Invs., LDC*, 280 F. Supp. 2d 128 (S.D.N.Y.), *recon. granted in part*, No. 99-2821, 2003 WL 22480052 (S.D.N.Y. Oct. 31, 2003).

[9] The District Court also dismissed a separate alternative Section 16(b) claim (the second cause of action) that the Bondholders asserted against Comcast only.

C. The SEC Determines That The District Court Should Be Affirmed.

On appeal, prior to the Second Circuit's affirmance of the District Court's dismissal of the Bondholders' Complaint, the Second Circuit requested the SEC to submit an *amicus curiae* brief. After soliciting the parties' views and meeting with their counsel, the SEC filed its *amicus* brief on February 9, 2006 ("SEC *Amicus* Brief"). *See* Cox App. 1a-34a. The SEC rejected the Bondholders' claim that the Put's exercise date, rather than its establishment date, should be deemed a Section 16(b) sale (Cox App. 13a-14a) and recommended that the District Court's ruling be affirmed (Cox App. 9a, 30a).

In reaching this conclusion, the SEC relied on the 1991 amendments to its Section 16(b) rules. Cox App. 10a-13a. The SEC explained that these amendments were specifically designed to eliminate the potential for an insider to easily circumvent Section 16(b) through the use of derivative securities:

> Before 1991, the purchase or sale of securities underlying a derivative security [such as a fixed price option][10] occurred on the exercise of the derivative, rather than upon its creation. In 1991, the Commission noted that this left "open a significant potential for short-swing abuse in trading derivative securities."

Cox App. 10a (quoting *Ownership Reports and Trading By Officers, Directors and Principal Security Holders*, Exchange Act Release No. 28,869, 56 Fed. Reg. 7242, 7250 (Feb. 21, 1991) ("1991 Release")).

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[10] As the SEC explained in its *Amicus* Brief, the term "derivative security" includes "'any option'" with an "'exercise or conversion privilege at a price related to any equity security, or similar securities with a value derived from the value of an equity security,'" and includes a "put equivalent position" such as a fixed price put option. Cox App. at 11a-12a (quoting 17 C.F.R. § 240.16a-1(c)).

The SEC then offered the following example of how an insider could use a fixed price put to profit under the pre-1991 rules:

> [A]n insider who knows of impending negative information can negotiate a fixed price put, enabling it to sell, after the negative information is released and the price falls, at the higher price. The insider unfairly uses the inside information by fixing the price when the derivative is created, not when it is exercised.

Cox App. 11a. Thus, by acquiring a put with a fixed price, an insider can obtain the same short-swing profit that it could by selling stock. Although these two events are equivalent, one event (the traditional sale) was a Section 16(b) sale under pre-1991 law and the other (the acquisition of the fixed price put) was not.

The SEC amended its rules in 1991 to address this disparity. Cox App. at 11a. Specifically, the amended rules provide that the *establishment* of a put equivalent position (such as a put with a fixed exercise price)[11] "'shall be deemed a sale of the underlying securities for purposes of section 16(b).'" Cox App. at 11a-12a (quoting 17 C.F.R. § 240.16b-6(a)). In contrast, under SEC Rule 16b-6(b), the *exercise* of an option at its fixed price is *not* a Section 16(b) sale, since its establishment has already been recognized as a sale. 17 C.F.R. § 240.16b-6(b).

The SEC applied these rules and their underlying policy rationale to the March 2000 Put to determine that its March

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[11] Rule 16a-1(h) defines a "put equivalent position" as "a derivative position that increases in value as the value of the underlying equity decreases . . . ." 17 C.F.R. 240.16a-1(h). As the SEC noted, a put with a fixed exercise price comes within this definition because it "increases in value as the price of the underlying stock decreases because the spread between the market price and the fixed exercise price increases." Cox App. 12a.

28, 2000 establishment was the only Section 16(b) sale attributable to the Put. The SEC first explained that, under its rules, a hybrid put instrument such as the March 2000 Put was equivalent to two puts: a fixed put and a separate floating put:

> In this case, the March 2000 [Put] presented [Cox] with [a] put[] with a fixed price of $48 paired with [a] put[] with a floating price based on a specified market average.

Cox App. at 13a (emphasis added).

The SEC then determined that because the hybrid Put's exercise price was solely its $48 fixed price, the Put's establishment constituted the sole deemed Section 16(b) "sale" under Rules 16b-6(a) and (b):

> In January 2001, with the market price far below $48, the defendants chose to exercise their puts at the fixed price. *The opportunity to abuse inside information existed only at the time the fixed exercise price was set. . . . Because the fixed price was used in this case, the establishment of the puts is when the six month trading period should begin.*

Cox App. 13a (emphasis added).

D. The Second Circuit Affirms The District Court.

Consistent with the SEC *Amicus* Brief and the deference to be accorded to the agency that administers a statutory provision,[12] the Second Circuit likewise determined that the March 2000 Put was a "'hybrid option,' because [its] pricing formula ha[d] both fixed and floating components" (Pet. App. 4a), and was cognizable as a Section 16(b) sale solely on March 28, 2000 (Pet. App. 8a).

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[12] *See generally Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

The Second Circuit explained that two regulations compelled this result. Pet. App. 8a. First, Rule 16b-6(a) provides that "the *establishment* of . . . a put equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) . . . ." 17 C.F.R. § 240.16b-6(a) (emphasis added). Second, Rule 16b-6(b) provides that "the *disposition* of underlying securities *at a fixed exercise price* due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) . . . ." 17 C.F.R. § 240.16b-6(b) (emphasis added).

The Second Circuit concluded that, "[r]ead together, the two rules treat the *acquisition* date of a put as the only sale date if the option is ultimately exercised according to a fixed price mechanism." Pet. App. 8a (italics in original; underline added). Therefore, the Second Circuit ruled that because the March 2000 Put was exercised solely at its $48 per share fixed price, the deemed sale occurred *only* on March 28, 2000, when the Put was established, and not on the later exercise date. Accordingly, the Second Circuit affirmed the District Court's decision that the Bondholders failed to plead matching Section 16(b) transactions by Cox. Pet. App. 8a-9a.

III. REASONS THAT THE PETITION SHOULD BE DENIED

There is no reason for the Court to grant *certiorari* in this case. Rule 10(c), on which the Bondholders rely in their petition (Pet. at 2), provides that this Court may grant a writ of *certiorari* to address an "important question of federal law that has not been, *but should be*, settled by this Court." SUP. CT. R. 10(c) (emphasis added). For the multiple independent reasons set forth below, there is no such question of federal law present in this case.

A. There Is No Circuit Split Or Issue Of Widespread Application In This Case Demanding The Court's Attention.

First, the Court need not grant *certiorari* because there is no circuit split involving any issue presented in this case; the Second Circuit is the only Court of Appeals to have addressed these issues.[13] Moreover, the District Court (citing three prior district court decisions) and the SEC (in its *Amicus* Brief) agreed with the Second Circuit that the Bondholders' Section 16(b) claims should be dismissed. In contrast, the Bondholders fail to cite a single case that supports reversing the Second Circuit's ruling, and there is none.

Second, by the Bondholders' own admission, this case does not involve issues of widespread application to which this Court should devote its scarce judicial resources. Throughout the course of this litigation the Bondholders have taken great pains to argue that the March 2000 Put was entirely different from any other instrument, and that rules applicable to other hybrid derivatives thus could not be applied to it:

- "[T]his was no run of the mill put." Compl. ¶ 44, Pet. App. at 49a.
- "[P]recedent . . . simply does not 'work' when applied to the *unique instrument* at issue here . . . ." Appellant's Br. at 24 (emphasis added).
- The March 2000 Put is different from "any instrument in any other reported case of which we are aware . . . ." Appellant's Br. at 37.

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[13] In fact, as explained in Section C below, the principal disagreement at this point seems to be between the position that the Bondholders adopted in their Complaint and argued below (i.e., that there was *one* Section 16(b) sale occurring after exercise of the Put), and the belatedly devised and inconsistent position that they now seek to press before this Court (i.e., that there were *two* Section 16(b) sales).

- "This is not a typical put." Transcript of October 17, 2005 Oral Argument Before The Second Circuit ("Tr.") at 10. *See also id.* at 4 (the Put was "a unique instrument").

Although respondents believe the Bondholders' assertions regarding the uniqueness of the March 2000 Put are exaggerated, it is clear that the resolution of the issues in this case will hardly have "widespread application." In fact, there have been only a handful of published opinions dealing with hybrid derivative securities under Section 16(b) in the history of the statute. For these reasons and on the additional grounds set forth below, this Court should deny the petition.

B. The Second Circuit Correctly Determined That The Only Section 16(b) Sale Occurred On The March 2000 Put's Establishment Date.

This Court also need not grant *certiorari* because the decisions of the courts below were correct. Specifically, in affirming the dismissal with prejudice of petitioner's Section 16(b) claim against Cox, the Second Circuit reached a conclusion that is fully consistent with (i) the controlling statute and regulations, (ii) the relevant regulatory policy, and (iii) the SEC's *Amicus* Brief submitted to the Second Circuit supporting the dismissal of the Bondholders' Complaint.

First, the Second Circuit's decision to affirm the District Court is mandated by the relevant SEC regulations. At the outset, the Second Circuit properly concluded that the March 2000 Put was a hybrid option with *both* a $48 per share fixed component *and* a separate floating market price component. Pet. App. 4a. Below, the Bondholders essentially argued that the Put contained "no real fixed-price component" because, if market conditions had been different, the Put might have been exercised at a higher floating price for a lower number of shares due to its consideration cap. In properly rejecting

this argument as "erroneous" (Pet. App. 4a-5a), the Second Circuit stated:

> The prospect of a higher exercise price does not mean that there is no fixed-price component; *the prospect of a higher exercise price [through the floating component] is what makes the option a "hybrid" in the first place.*

Pet. App. 5a, n.2 (emphasis added).

Based on this determination, the Second Circuit then correctly applied the SEC's regulations to the fixed and floating components of the hybrid as, in effect, separate instruments contained within the March 2000 Put. Because the March 2000 Put contained a fixed price component, the Second Circuit necessarily concluded that it was a "put equivalent position,"[14] which is a form of "derivative security."[15] Pet. App. 8a & n.3.

The Second Circuit then examined the SEC rules pertaining to derivative securities. SEC Rule 16b-6(a) provides that, in light of the recognized equivalence between deriv-

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[14] As the Second Circuit noted, the SEC's definition of put equivalent position (Rule 16a-1(h)) "specifically covers put options such as those involved in this case" because through the "locked-in sale price" provided by the March 2000 Put's fixed price component, Cox "realized profit as At Home [stock] declined in price." Pet. App. 8a, n.3; 17 C.F.R. § 240.16a-1(h) ("put equivalent position" includes "derivative security position that increases in value as the value of the underlying equity decreases").

[15] The Bondholders argued below that the March 2000 Put was excluded from the definition of "derivative security" because it had an unexercised floating price component. This contention is meritless. "Rule 16b-6(a)(6) only 'excludes those securities *without a fixed exercise price.*'" *Oz Masterfund*, 2001 WL 767013 at *9 n.14 (quoting 1991 Release) (emphasis added). Thus, a hybrid (like the March 2000 Put), "which contains a fixed exercise price, would fall within the definition of 'derivative security.'" *Id.*

ative positions and their underlying equity securities (*see* 1991 Release, 56 Fed. Reg. at 7250), "the establishment of or increase in a put equivalent position . . . shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act." 17 C.F.R. § 240.16b-6(a). In contrast, Rule 16b-6(b) provides that, to avoid double liability:

> *the disposition* of underlying securities *at a fixed price* due to the exercise of a put equivalent position [such as a fixed put option] shall be *exempt* from the operation of section 16(b) . . . .

17 C.F.R. § 240.16b-6(b) (emphasis added).

The Second Circuit correctly determined that these rules "decide the case": (i) the establishment of the Put's fixed price component on March 28, 2000 was a sale under Rule 16b-6(a); (ii) the exercise of the fixed price component in January 2001 was a non-event under Rule 16b-6(b); and (iii) the mere existence of the floating price component did not lead to any Section 16(b) event because it was never exercised. *See* Pet. App. at 8a. *See also* 1991 Release, 56 Fed. Reg. at 7253 (rules require "the floating price derivative security" to be exercised to constitute a Section 16(b) event). Thus, the Second Circuit properly determined that, because the Put's "floating price [component] did not affect the calculation of the exercise price, the section 16(b) sale in this case occurred *only* with the acquisition of the [Put] . . . [on] March 28, 2000." Pet. App. 8a (emphasis added).

Second, the Second Circuit's decision is fully consistent with the policy rationale underlying the SEC's regulations. The Bondholders' proposed approach below of treating *the exercise* (rather than *the establishment*) of the fixed price component of the March 2000 Put as the relevant Section 16(b) event would reopen a loophole that the SEC closed with its 1991 revisions to its Section 16(b) rules. Under the Bondholders' approach (and the law prior to 1991), an insider with knowledge of an impending release of negative in-

formation could avoid Section 16(b) liability entirely by: (i) acquiring a hybrid put with a fixed component on Day 1 (a non-event under the Bondholders' approach); (ii) purchasing stock on Day 2 after the stock price had fallen (a non-matchable purchase under the Bondholders' approach); and (iii) waiting six months to exercise the fixed component of the hybrid put at the higher price (a non-matchable sale under the Bondholders' approach). Although the insider would wait six months to exercise the put at its fixed price, the insider could be certain of the put's *fixed* exercise price (and the existence of a locked-in profit) as of Day 1. Prior law, however, treated the exercise of the put as the relevant sale.

Current law—Rules 16b-6(a) and (b)—dictates that *only* the put's establishment is deemed a sale. These rules reflect the SEC's 1991 determination that the primary potential for abuse of an option with a fixed price component occurs at its establishment. Pet. App. 7a ("As to options with fixed price components, the SEC is of the view that the greatest risk of short-swing profiteering arises at the point in time nearest the establishment of the option.").

This is in contrast to a purely floating price option, which as the District Court explained, does not allow its holder to lock-in a profit until it is exercised, and accordingly is not treated as a Section 16(b) event until it is exercised. *See* Pet. App. 22a ("This type of option does not pose a risk of insider trading at the time of its creation because it does not lock in a price that may profitably diverge from the market price (i.e., once the inside information reaches the market).").

The below chart illustrates an insider's ability to insulate a short-swing profit from Section 16(b) liability under the approach that the Bondholders advocated in the courts below. The chart's shaded cells indicate the matching transactions that are present under the SEC rules and the Second Circuit's

holding, but are absent under the Bondholders' proposed treatment of hybrid options below.[16]

Opportunity For Abuse Created By Bondholders' Position

Date	Event	Bondholders' Position Below	Second Circuit Classification
Day one	Insider learns of an upcoming price decrease from existing $100 market price, and enters into hybrid fixed/floating put at the greater of **$100 a share** or a floating market price.	**Non-event.** The Bondholders ignore the acquisition of the fixed component.	**Matchable Sale** at $100 a share. Rule 16b-6(a) treats the establishment of the put as a sale.
The next day	Stock price drops to **$50 a share**, and the insider buys stock at that price.	**Non-Matchable Purchase** at $50 a share.	**Matchable Purchase** at $50 a share. The insider is liable for a $50 per share profit.

[16] Because the insider in the above scenario exercises the hybrid put solely at its fixed price component, the same result occurs regardless of whether the put contains a restriction (as the March 2000 Put did) on total consideration that would limit the number of shares that could be sold at the (irrelevant) floating price.

Date	Event	Bondholders' Position Below	Second Circuit Classification
Six months and one day later	Insider exercises put right and sells the stock originally bought at $50 for the **$100 a share fixed price,** making a **$50 per share profit**.	**Non-Matchable Sale** at $100 a share. The insider evades Section 16(b) liability because the purchase and sale are over six months apart.	**Non-event**. As noted above, a short-swing profit already is recoverable. The fixed price exercise is a non-event under Rule 16b-6(b).

Because the Bondholders have no answer for the loophole that would be created by the position that they took in the courts below, they now simply have abandoned that position and replaced it with their new "dual sale" argument. That argument asserts that the March 2000 Put should be treated as a sale both on its establishment date *and* on the last day of the irrelevant floating component's market pricing window. *See* Pet. at 9, 11 n.4. As established in Section C, however, the Bondholders' new "dual sale" argument was not properly raised below (and thus cannot be considered) and, in any event, is directly contrary to SEC rules.

Third, the Second Circuit's decision is in accord with the SEC's interpretation of its regulations in its *Amicus* Brief. Courts are "bound by the SEC's interpretations of its regulations in its amicus brief[s], unless they are 'plainly erroneous or inconsistent with the regulations.'" *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000) (citing *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997).). Thus,

because the SEC reached the correct result consistent with its regulations, the Bondholders' petition should be denied.

C. The Bondholders Present No Valid Basis To Reverse The Second Circuit.

Certiorari should also be denied because the Bondholders have failed to present any basis for reversal of the Second Circuit and District Court's opinions.

First, as this Court has repeatedly held, a petition for *certiorari* should not be granted where a petitioner bases its argument on a contention not raised below. *See, e.g., City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 258 (1987) (dismissing writ as improvidently granted, where petitioner advocated position before the Supreme Court it did not press below); *see also Davenport v. Harry N. Abrams, Inc.*, 249 F.3d 130, 132 (2d Cir. 2001) (party cannot assert on appeal an argument that it failed to raise in the district court).

Here, the lynchpin of the Bondholders' request for *certiorari* is their new "dual sale" approach, whereby they claim the Put should be treated as a Section 16(b) "sale" *both* on its establishment date (March 28, 2000) *and* fifteen days after its exercise when the irrelevant floating component's market pricing window closed (February 2, 2001). Pet. at 9, 11 n.4. Ignoring their own Complaint and their arguments below, the Bondholders now assert that they "argued [this dual approach] to the Second Circuit." Pet. at 9.

To the contrary, the position that the Bondholders took in their Complaint[17] and consistently argued in their briefs

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[17] *See* Compl. ¶ 69, Pet. App. 58a (February 2, 2001 end of the floating component's market pricing window "was equivalent to a 'sale' by Cox" of At Home common stock).

before the District Court[18] and Second Circuit[19] was that the March 2000 Put was a Section 16(b) sale solely on or after its exercise. For example, in their reply brief before the Second Circuit, the Bondholders contended:

> *Only* fifteen days after Cox . . . gave notice to AT&T of [its] intent to exercise the option did this instrument become a derivative security and a 'sale' occur under Section 16(b).

Appellant's Reply Br. at 9 (emphasis added); *see also id.* at 12 ("[T]he Court should hold that . . . *the 'sale'* occurs . . . in this case [on] February 2, 2001.") (emphasis added). Indeed, at oral argument before the Second Circuit, the Bondholders expressly disavowed that the establishment of the March 2000 Put could be a sale:

> If your Honors go back and look at our complaint, the one thing that is *crystal clear* is we said [the Put's establishment] was *not a sale.* There was no event under 16(b) until *after* [Cox] gave notice [of exercise].

Tr. at 36 (emphasis added).

Consistent with these representations, the Second Circuit's opinion recounts that the Bondholders "argue[d] that, for the purposes of section 16(b), *the sale date was the exercise date*" of the March 2000 Put. Pet. App. 5a (emphasis

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[18] *See* Pet. App. 26a (reflecting that the Bondholders "argue[d] that [the district court] should . . . treat the [Put] as a purely floating derivative" cognizable as a sale only on its exercise date).

[19] *See* Appellant's Br. at 2 (asserting that "the district court erred . . . in holding that a Section 16(b) sale 'first' occurred when the Put . . . was created"); *see also* Appellant's Br. at 21 (second cause of action is relevant only "[i]f contrary to the facts and logic, this Court finds that a Section 16(b) sale occurred in March 2000, and not in February 2001").

added).[20] In their *certiorari* petition, however, the Bondholders do not even acknowledge that they made this argument below, and instead claim that they argued the dual sale approach "to the Second Circuit." Pet. at 9.

In any event, even if the Bondholders were somehow deemed to have raised the "dual sale" argument before the Second Circuit, that argument—only hinted at for the first time on appeal months after full briefing and oral argument in a supplemental reply letter brief[21]—would still have come far too late to be considered by this Court. *See Davenport*, 249 F.3d 132-33 ("argument [wa]s not properly asserted" because litigant "never argued [it] in district court"); *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 169 (2d Cir. 2006) (new argument raised for the first time in reply brief was untimely and deemed waived). Accordingly, *certiorari* should be denied. *City of Springfield, Mass. v. Kibbe*, 480 U.S. at 258.

Second, even if it had been properly raised (which it was not), the Bondholders' new "dual sale" argument fails on the

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[20] Because the Bondholders asserted that there was *only* one sale, the Second Circuit noted that "[i]f the section 16(b) sale occurred as of the granting of the [March 2000 Put], it is *undisputed* that At Home's short-swing [profit] claim fails as to Cox." Pet. App. 5a (emphasis added).

[21] Specifically, the Bondholders mentioned a "dual sale" only in a single passage in a letter to the Second Circuit replying to the SEC *Amicus* Brief. *See* Bondholders' Letter dated March 3, 2006 ("Reply Letter Br."). That letter never argued that the Second Circuit should adopt a "dual sale" position, but simply noted—incorrectly—that "[n]othing in the SEC's [brief] precludes a finding here" that two sales *might* be recognized. *See id.* at 4. Rather, the Bondholders' letter unequivocally took the position that "*the sale* occurred on February 2, 2001, when the price and number of shares subject to the [Put] were set for the first time." *Id.* at 2 (emphasis added). Given the Bondholders' failure to properly raise their new "dual sale" argument, the Second Circuit correctly elected not to address that argument in its decision. *See* Pet. App. 5a (recounting that the Bondholders argued that "the sale date was the exercise date").

merits. As explained in Section B above, the fixed price exercise of the Put did not lead to a "sale" under the SEC's regulations. *See* 17 C.F.R. § 240.16b-6(b). Moreover, the SEC itself has twice rejected the dual sale approach the Bondholders now propose: first in its 1991 regulations, which treat a fixed price exercise as a non-event (i.e., Rules 16b-6(a) and (b)), and second in its *Amicus* Brief to the Second Circuit that concluded that the March 2000 Put can only be recognized as a sale on its March 28, 2000 establishment date (Cox App. 13a-14a).[22]

Third, the Bondholders are flatly wrong in asserting that the March 2000 Put should be treated as a sale on its exercise date because supposedly "the risk of speculative abuse with respect to the Put . . . dramatically increased" over time. Pet. at 11. As the Second Circuit and SEC found (and as demonstrated above in Section B), for options with fixed price components (such as the Put), "the greatest risk of short-swing profiteering arises at the point in time nearest the establishment of the option," at which time corporate insiders with non-public information can use the hybrids to lock-in guaranteed profits. *See* Pet. App. 7a. This *locked-in* profit is not dependent upon the passage of time, but rather exists regardless of the option's exercise date.

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[22] The Bondholders' "dual sale" approach to the *fixed* price exercise of the March 2000 Put must be distinguished from the issue of a two-step profit calculation for a hybrid exercised at a *floating* price (an issue not present here). As noted above, the Bondholders' "dual sale" approach, which would treat both the establishment and exercise of the fixed price component of a hybrid put as a Section 16(b) sale, violates Rule 16b-6(b). That rule mandates that the "the closing of a derivative security position as a result of its exercise . . . shall be exempt from the operation of" Section 16(b). 17 C.F.R. § 240.16b-6(b). On the other hand, the SEC rules do not forbid a two-step profit calculation for the exercise of a hybrid's floating component, and in addition to the District Court in this case, at least one other court has suggested that a two-step approach may be applied in such circumstances. *See Schaffer*, 280 F. Supp. 2d at 140.

The Bondholders ignore this locked-in profit and instead present a complicated Rube Goldberg scenario that purportedly demonstrates this "increased potential for speculative abuse." Specifically, the Bondholders posit that an insider might: (1) enter into a hybrid put at a $48 fixed price or a floating market price; (2) wait ten months for the put to be exercisable under its terms; (3) receive information that a company will (a) announce news that will make its stock price drop to $24 a share, *and then* (b) announce additional news that will make its stock price rise above $24 a share; (4) exercise the put at the $48 per share price after the release of the bad information; (5) buy back the stock sold through the put at a lower market price; and (6) benefit from an increase in the price of stock from the anticipated appreciation of the stock. *See* Pet. at 11.

In fact, this hypothetical does not demonstrate any increased potential for speculative abuse between the Put's establishment and its exercise. Rather, the SEC regulations that dictate how derivatives are treated reflect the SEC's careful balancing of the risks posed by these instruments. Because the hybrid put in the example is exercised at its fixed price, and its floating component *never* comes into play, an insider could accomplish the same effect as in the scenario above through a *purely fixed price put.* By design, as explained above in Section B, SEC Rules 16b-6(a) and (b) treat the establishment of such a fixed price put as a sale and its exercise as a non-event. *See* 17 C.F.R. § 240.16b-6(a) & (b). Because a hybrid put exercised at its fixed price presents the *same* potential for abuse as a purely fixed price put, it makes perfect sense that such a hybrid should be treated the same way as a purely fixed price put.[23]

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[23] In addition, this convoluted scenario would not allow an insider to circumvent Section 16(b). Section 16(b) by design only covers "short swing" profits, i.e. those obtained from a matching purchase and sale within a period of less than six months. Because the establishment of a

Fourth, the Bondholders' assertion that the March 2000 Put should be treated as a sale in 2001 because its hybrid pricing mechanism purportedly did not allow Cox to "hedg[e] and speculat[e]" until close to the Put's exercise date (Pet. at 10-11) is nonsensical and entirely misapprehends the purpose of Section 16(b). Section 16(b) is aimed at preventing insiders from making profits from the misuse of inside information regarding *known* future price movements. *See* 15 U.S.C. § 78p(b) (statute is "[f]or the purpose of preventing the unfair use of information which may have been obtained" by insiders); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 591 (1973) (prior to enactment of Section 16(b), "[i]nsiders could exploit information not generally available to others to secure quick profits").

Section 16(b) is not aimed at preventing insiders from hedging against *unknown* risks, or from protecting themselves from price swings that a stock price *might* take (i.e., situations where an insider has *no inside information*), as the Bondholders imply. Because any locked-in profit from inside information is known when a hybrid derivative (such as the Put) is established, SEC rules treat derivatives with fixed exercise prices as Section 16(b) events on the date of their establishment, and not later based on their alleged potential to "hedge" against unknown market developments. *See* 17 C.F.R. § 240.16b-6(a) & (b).

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fixed price put is equivalent to a simple sale, Rule 16b-6(a) treats that establishment as a sale. The Bondholders' hypothetical posits a 10 month waiting period from the establishment of the fixed price option (step one) until the alleged matching purchase (step five), and thus by definition does not involve a matching purchase and sale within a period of less than six months. Moreover, the profit from the difference between the reduced purchase price (in step five) and the anticipated higher price (in step six) would be captured by Section 16(b) if the insider realized that profit by selling at the higher price within six months of the purchase.

Finally, the Bondholders' contention that the Second Circuit employed a "hindsight" approach when it held that the March 2000 Put was a sale as of March 28, 2000 (Pet. at 12) is wholly misguided.[24] In fact, the Second Circuit applied Rule 16b-6(a) to the establishment of the Put (to conclude that it was a sale), and separately applied Rule 16b-6(b) to the subsequent fixed price exercise of the Put (to conclude that it was an exempt non-event under Section 16(b)). *See* Pet. App. 8a. No "hindsight" at all was involved in this analysis. The Second Circuit *did not hold* that the March 2000 Put only *became* a sale in March 2000 when it was exercised at a fixed price in January 2001 (as the Bondholders suggest). Rather, it concluded that it was a sale on the date of its establishment because that is when the profit opportunity was locked-in.

CONCLUSION

WHEREFORE, respondents Cox Communications, Inc. and Cox @Home, Inc. respectfully request that the Bondholders' petition for a writ of *certiorari* be denied.

Respectfully submitted,

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[24] The Second Circuit's holding is also correct for a number of independent reasons not reached by the Second Circuit's opinion. Among other things, there was no matching Section 16(b) "purchase" of At Home stock and no purchase or sale of At Home securities would be cognizable under the unorthodox transaction doctrine. *See* Cox Appellate Brief at 45-55.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-CV

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC.,
COMCAST CORPORATION, COMCAST ONLINE
COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC.,
BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND
EXCHANGE COMMISSION, *AMICUS CURIAE*,
SUBMITTED AT THE REQUEST OF THE COURT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 4

I. THE ESTABLISHMENT OF THE PUTS IN MARCH 2000 CONSTITUTED A SALE OF AT HOME STOCK FOR PURPOSES OF SECTION 16(b) 4

II. THE MAY 2001 AGREEMENT TO CANCEL THE FIXED PRICE PUTS WAS A PURCHASE FOR SECTION 16(b) PURPOSES 9

III. COMCAST'S ACQUISITION OF THREE CABLE COMPANIES THAT OWNED AT HOME WARRANTS WAS NOT A PURCHASE OF THE WARRANTS FOR PURPOSES OF SECTION 16(b) 10

IV. THE "UNORTHODOX TRANSACTION DOCTRINE" IS INAPPLICABLE TO THE TRANSACTIONS IN THIS CASE 15

V. CONTROLLING DEFERENCE IS OWED BY THE COURT TO THE COMMISSION'S REASONABLE INTERPRETATIONS OF SECTION 16(b) AND RELATED COMMISSION RULES 16

A. This Court and the Supreme Court Have Repeatedly Held that a Court Is Bound by an Agency's Reasonable Interpretations of Its Own Regulations Provided in an *Amicus* Brief 16

TABLE OF CONTENTS—Continued

Page

B. This Court Should Accord *Chevron* Deference to Interpretations of the Federal Securities Statutes Provided in Commission *Amicus* Briefs 18

CONCLUSION 27

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(A)

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1): BRIEFS IN DIGITAL FORMAT

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES **Page**

Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461 (2004) 22
American Standard, Inc. v. Crane Co., 510 F.2d 1043 (2d Cir. 1974) 12
At Home Corporation v. Cox Communications, et al., 340 F. Supp. 2d 404 (S.D.N.Y. 2004) 2
Auer v. Robbins, 519 U.S. 452 (1997) 17, 18
Barnhart v. Walton, 535 U.S. 212 (2002) 17, 21, 23
Bowen v. Georgetown Univ. Hospital, 488 U.S. 204 (1988) 17
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945) 17, 18
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... 18, 19, 20, *passim*
Christensen v. Harris County, 529 U.S. 576 (2000) 20, 22
Community Health Center v. Wilson-Coker, 311 F.3d 132 (2d Cir. 2002) 23
Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25 (2d Cir.), *cert. granted*, 126 S. Ct. 34 (2005) 20, 23
DeMaria v. Andersen, 318 F.3d 170 (2d Cir. 2003) 17
Drake v. FAA, 291 F.3d 59 (D.C. Cir. 2002) 18
Ecarnacion v. Barnhart, 331 F.3d 78 (2d Cir. 2003) 18
In re Enterprise Mortgage Acceptance Co., LLC, Securities Litigation, 391 F.3d 401 (2d Cir. 2005) 20, 23
Foremost-McKesson, Inc. v. Provident Securities Co., 423 U.S. 232 (1976) 13
Gollust v. Mendell, 501 U.S. 115 (1991) 13

TABLE OF AUTHORITIES—Continued

Page

Gryl v. Shire Pharmaceuticals Group PLC., 298 F.3d 136 (2d Cir. 2002) 25
Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582 (1973) ..... 11, 12, 14, *passim*
LaFleur v. Whitman, 300 F.3d 256 (2d Cir. 2002) 18
Levy v. Southbrook International Investments, Ltd., 263 F.3d 10 (2d Cir. 2001) 17, 25
Martin v. Occupational Safety & Health Rev. Com'n., 499 U.S. 144 (1991) 18
National Cable & Telecommunications Assoc. v. Brand X Internet Services, __ U.S. __, 125 S. Ct. 2688 (2005) 19
In re New Times Securities Services, Inc., 371 F.3d 68 (2d Cir. 2004) 24, 26
Press v. Quick & Reilly, Inc., 218 F.3d 121 (2d Cir. 2000) 17
Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418 (1972) 12, 13
SEC v. American Board of Trade, Inc., 751 F.2d 529 (2d Cir. 1984) 14
Skidmore v. Swift & Co., 323 U.S. 134 (1944) 19
Taylor v. Vt. Dep. of Educ., 313 F.3d 768 (2d Cir. 2002) 18
United States v. Mead Corp., 533 U.S. 218 (2001) 20, 22
Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) 22
Yoder v. Orthomolecular Nutrition Institute, Inc., 751 F.2d 555 (2d. Cir. 1985) 14
Yourman v. Giuliani, 229 F.3d 124 (2d Cir. 2000) 17

TABLE OF AUTHORITIES—Continued

COMMISSION RELEASES **Page**

Notice of Proposal to Adopt a Rule Exempting from the Operation of Section 16(b) Certain Acquisitions and Dispositions of Securities Pursuant to Mergers or Consolidations, Exchange Act Rel. No. 4696, 17 Fed. Reg. 3177, 1952 SEC LEXIS 63 (April 9, 1952) 13

Ownership Reports and Trading By Officers, Directors and Principal Securities Holders, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242 (Feb. 21, 1991) 4, 5, 18

STATUTES AND RULES

Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*

Section 3(a), 15 U.S.C. 78c(a) 15

Section 3(a)(10), 15 U.S.C. 78c(a)(10) 14

Section 3(a)(13), 15 U.S.C. 78c(a)(13) 10, 14

Section 16(b), 15 U.S.C. 78p(b) ..... 1, 2, 3, *passim*

Rules Under the Securities Exchange Act of 1934, 17 C.F.R. 240.01, *et seq.*

Rule 16a-1(c), 17 C.F.R. 240.16a-1(c) 5

Rule 16a-1(c) (6), 17 C.F.R. 240.16a-1(c) (6) 7

Rule 16a-1(h), 17 C.F.R. 240.16a-1(h) 5

Rule 16a-9, 17 C.F.R. 240.16a-9 25

Rule 16a-10, 17 C.F.R. 240.16a-10 25

Rule 16a-11, 17 C.F.R. 240.16a-11 25

Rule 16a-12, 17 C.F.R. 240.16a-12 25

Rule 16a-13, 17 C.F.R. 240.16a-13 25

Rule 16b-1, 17 C.F.R. 240.16b-1 25

Rule 16b-2, 17 C.F.R. 240.16b-2 25

Rule 16b-3, 17 C.F.R. 240.16b-3 25

Rule 16b-4, 17 C.F.R. 240.16b-4 25

Rule 16b-5, 17 C.F.R. 240.16b-5 25

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES (Continued) **Page**

Rule 16b-6, 17 C.F.R. 240.16b-6 25
Rule 16b-6(a), 17 C.F.R. 240.61b-6(a) 5, 9
Rule 16b-6(b), 17 C.F.R. 240.61b-6(b) 6
Rule 16b-6(d), 17 C.F.R. 240.16b-6(d) 8, 9
Rule 16b-7, 17 C.F.R. 240.16b-7 25
Rule 16b-8, 17 C.F.R. 240.16b-8 25

MISCELLANEOUS

David S. Ruder, Address: The Development of Legal Doctrine Through Amicus Participation: The SEC Experience, 1989 Wis. L. Rev. 1167 (1989) 26
H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934) 13
Request for Commission Amicus Participation in a Pending Case, http://www.sec.gov/litigation/briefs/amicusrequest.htm 26

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-cv

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT

INTRODUCTION

The Securities and Exchange Commission submits this brief as *amicus curiae* in response to a request by the Court.

This action was brought by At Home Corporation ("At Home," "issuer," or "plaintiff") under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), to recover alleged short-swing profits obtained by insiders of At Home. The complaint alleges that defendants—Cox Communications, Inc., Comcast Corporation and their affiliates—sold and then purchased, or purchased and sold, At Home

equity securities within six months. The defendants are alleged to have acted as a group that owned more than 10 percent of At Home securities, and thus to be statutory insiders of At Home. The suit seeks recovery of profits the defendants allegedly realized on these short-swing trades. The district court dismissed plaintiff's Section 16(b) claims. *See At Home Corporation v. Cox Communications, et al.*, 340 F. Supp. 2d 404 (S.D.N.Y. 2004). The Commission agrees with the district court that defendants are not liable under Section 16(b).

BACKGROUND

At Home was founded by a number of cable companies in March 1995 to provide cable-based internet access to customers (Compl. ¶18). On March 28, 2000, the defendants, Cox and Comcast, entered into a letter agreement with AT&T ("agreement") in which Cox and Comcast acquired, respectively, a put to sell to AT&T up to $1.4 billion and $1.5 billion in At Home shares. Under the terms of the agreement, Cox and Comcast could sell each share for the higher of (1) $48 or (2) a floating average market price at the time of exercise (A-133; Compl. ¶45).

Defendants notified AT&T of their intention to exercise their puts on January 11, 2001. At that time, At Home's shares were selling for an average $7.72 per share (Compl. ¶53). Accordingly, defendants' notices to AT&T stated that the defendants "assumed" that the purchase price would be $48 per share (A-165, 168). AT&T did not want the shares. AT&T and the defendants entered into a new agreement on May 18, 2001 whereby the defendants canceled their puts in exchange for 155.3 million shares of AT&T stock worth $3.43 billion (Compl. ¶56).

The plaintiff alleged that Cox and Comcast sold At Home shares for purposes of Section 16(b) on January 11, 2001, when they provided notice of their intent to exercise the

puts.[1] This was within six months of the May 18, 2001 agreement to rescind the puts, which plaintiff contended was a purchase of At Home securities. The district court agreed that the rescission was a purchase, but held that the earlier sale occurred on March 28, 2000, when the puts were established, so that the sale and purchase took place more than six months apart, and were thus not subject to Section 16(b).

The plaintiff alternatively claimed that if the sale occurred on March 28, 2000, Comcast made matching purchases when, between January and August 2000, it acquired three cable companies that held At Home securities. The district court dismissed this claim, holding that these indirect acquisitions were not cognizable transactions under Section 16(b).

The plaintiff appealed, and this Court has sent a letter to the Commission inviting it to answer five questions. We address those questions in order.

ARGUMENT

I. THE ESTABLISHMENT OF THE PUTS IN MARCH 2000 CONSTITUTED A SALE OF AT HOME STOCK FOR PURPOSES OF SECTION 16(b).

The Court asks "[w]hether the establishment of the puts on March 28, 2000 constituted a sale of At Home securities for purposes of section 16(b) * * *." It did. Before 1991, the purchase or sale of securities underlying a derivative security occurred on the exercise of the derivative, rather than upon its creation. In 1991, the Commission noted that this left "open a significant potential for short-swing abuse in trading derivative securities." *Ownership Reports and Trading By*

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[1] Alternatively, the plaintiffs contended that the sales occurred on February 2, 2001, at the end of the 30 day period for determining if the fixed rate or the floating rate was higher.

Officers, Directors and Principal Securities Holders, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242, 7250 (Feb. 21, 1991). In that release, the Commission offered the following example:

> [A]n insider with knowledge of a positive material development, to be announced shortly, determines that while he wants to retain his existing equity position, he wants to take advantage of the information, so he purchases issuer warrants. After the public announcement and rise in the stock price the insider sells his common stock, obtaining a short-swing profit, knowing that he can replace the shares at a predetermined price since he holds the warrants. Under the former rules, he could simply wait six months and a day to exercise the warrants so the profit would not be subject to section 16(b) and not recoverable by the company.

Id. at 7250. Likewise, an insider who knows of impending negative information can negotiate a fixed price put, enabling it to sell, after the negative information is released and the price falls, at the higher price. The insider unfairly uses the inside information by fixing the price when the derivative is created, not when it is exercised.

In 1991, the Commission amended the rules so that the acquisition of a "derivative security" is also considered the acquisition of the underlying securities for purposes of Section 16(b). "[D]erivative security" was defined to mean "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security * * *." Rule 16a-1(c), 17 C.F.R. 240.16a-1(c). Rule 16b-6(a), 17 C.F.R. 240.16b-6(a), provides:

> The * * * establishment of or increase in a put equivalent position or liquidation of or decrease in a

> call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act * * *.

A "put equivalent position" is defined by Rule 16a-1(h), 17 C.F.R. 240.16a-1(h), to mean "a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position." A put with a fixed exercise price increases in value as the price of the underlying stock decreases because the spread between the market price and the fixed exercise price increases.

On the other hand, a floating price linked to the market price does not have that attribute. The 1991 rules draw a sharp distinction between fixed and floating prices. The Commission explained that "[r]ights without a fixed exercise price do not provide an insider the same kind of opportunity for short-swing profit since the purchase price is not known in advance." *Ownership Reports*, Exchange Act Rel. No. 28869, 56 Fed. Reg. at 7252. The Commission stressed that "[t]he opportunity to lock in a profit begins when the exercise price is fixed; at that time, the right becomes a derivative security subject to section 16." *Id.* Conversely, the later *exercise* of a derivative at its *previously* fixed price is exempt from Section 16(b) and has no Section 16(b) consequences. *See* Rule 16b-6(b), 17 C.F.R. 240.16b-6(b).

On the other hand, the Commission explained that:

> [A] right with a floating exercise price is not required to be reported and will not be deemed to be acquired or purchased, for section 16 purposes, until the purchase price of the underlying security becomes fixed or established, which commonly occurs at exercise. Thus, a right to purchase an equity security is deemed acquired as of the date the exercise or conversion price becomes fixed, and the acquisition, absent an exemption, would be

> matchable for section 16(b) purposes with a disposition within six months of the fixing of the price.

56 Fed. Reg. at 7253. "The primary potential for abuse [of inside information] arises at the time of exercise for a floating price derivative security because only at exercise is the price fixed and, therefore, the extent of the profit opportunity defined." Thus, "[b]y treating the exercise of the floating price derivative security as the 'acquisition' of the underlying security, the rules mitigate the incentives for insiders to abuse their informational advantage."[2]

In this case, the March 2000 agreement presented the defendants with puts with a fixed price of $48 paired with puts with a floating price based on a specified market average. In January 2001, with the market price far below $48, the defendants chose to exercise their puts at the fixed price. The opportunity to abuse inside information existed only at the time the fixed exercise price was set. If inside information is learned only after the fixed price is set, the information cannot be abused in later exercising at the fixed price. Because the fixed price was used in this case, the establishment of the puts is when the six month trading period should begin. The district court correctly concluded that the establishment of the puts in March 2000 constituted a sale of At Home stock under Section 16(b).

Plaintiff nevertheless argues that the hybrid security should be treated as a floating price derivative security, as though there were no fixed component. The cornerstone of plaintiff's contention is that, "in contrast to any other instrument in any other reported case of which we are aware, the **only** fixed component at issuance was not the number of shares or price per share, but the **total consideration** to be paid by the

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[2] This is reflected in Rule 16a-1(c)(6), 17 C.F.R. 240. 16a-1(c)(6), which excludes from the definition of a "derivative security" "[r]ights with an exercise or conversion privilege at a price that is not fixed."

grantor of the option (AT&T)." (Appellant's Brief p. 37 (emphases in original)). Thus, "[t]he only fact that all the parties to the Put knew on March 28, 2000 was that AT&T would pay a total of approximately $2.9 billion, but the number of shares and the price per share could not be known until after notice was given and the stock market determined the final price"(Appellant's Brief p. 37-38).

The district court correctly rejected this argument, pointing out that "[t]he specified maximum overall price of $2.9 million, when combined with the specified minimum per-share price of $48, dictated that defendants could sell, at most, 60.4 million shares.[3] Thus the initial agreement *did* limit the number of shares which AT&T would be required to buy." 340 F. Supp. 2d at 410 (emphasis in original).[4]

II. THE MAY 2001 AGREEMENT TO CANCEL THE FIXED PRICE PUTS WAS A PURCHASE FOR SECTION 16(b) PURPOSES.

The Court next asks whether the May 18, 2001 agreement—in which the defendants agreed not to exercise their puts—was a purchase for purposes of Section 16(b). The district court held that it was a purchase but that, since it occurred more than six months after the sale on March 28, 2000, the plaintiff's first claim should be dismissed. That is correct.

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[3] Since both the total and per share prices were fixed, the number of shares with respect to the fixed price component was fixed.

[4] Plaintiff also argues that the holding of the district court is unworkable in cases when the insider exercises a hybrid put at the floating rate because it would require there to be a second sale of the same underlying securities: "There could not be a 'second' sale, because according to the district court, **all** of the shares were deemed sold on March 28, 2000 at $48 per share * * *" (Appellant's Brief p. 37). This is incorrect. Where an insider exercises a hybrid put at the floating price, the fixed price put expires on an exempt basis by virtue of Rule 16b-6(d). The underlying shares become available for a different sale.

Under Rule 16b-6(a) the "liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) * * *." The May 2001 agreement explicitly cancelled what had been the defendants' put equivalent position. Rule 16b-6(d), 17 C.F.R. 240.16b-6(d), provides that "[t]he disposition or closing of a long derivative security position, as a result of cancellation or expiration, shall be exempt from section 16(b) of the Act *where no value is received* from the cancellation or expiration" (emphasis added). This agreement does not qualify for that exemption since Cox and Comcast did receive value in exchange for agreeing to forgo the right to exercise their puts.

Defendants nonetheless contend that "[a]fter the March 2000 Put was exercised on January 11, 2002, *there was no put to 'cancel*'" and that the "[c]ourts uniformly have held that 'once an option is exercised, *the option itself ceases to exist* and an enforceable bilateral contract is formed.'" (Brief of Appellee Cox p. 45 (emphases in original); *see also* Brief of Appellee Comcast pp. 38-39). Defendants' argument places semantics over substance: while the defendants gave notice of their intent to exercise the puts, they never, in fact, followed through and transferred any shares to AT&T.

III. COMCAST'S ACQUISITION OF THREE CABLE COMPANIES THAT OWNED AT HOME WARRANTS WAS NOT A PURCHASE OF THE WARRANTS FOR PURPOSES OF SECTION 16(b).

This Court's third question is "[w]hether Comcast's acquisition of three cable companies that owned warrants to purchase shares of At Home stock in January, March and August 2000 should be characterized as a § 16(b) purchase of At Home securities." Under Count II of their complaint, plaintiff urges that if, *arguendo*, as Comcast contends, the creation of the put in March 28, 2000 constituted a 'sale' for purposes of Section 16(b), then that sale can be matched with

Comcast's acquisition of the warrants, which took place within six months of March 28, 2000 (Appellant's Brief pp. 44-46; *See also* Compl. ¶ 74).[5] The plaintiff argues that "purchase," as defined by Section 3(a)(13) of the Exchange Act, 15 U.S.C. 78c(a)(13), includes "any contract to buy, purchase, or otherwise acquire" and that this definition is broad enough to include the purchase of another company that, in turn, owns securities of the issuer (Appellant's Brief pp. 44-46).

The district court held that these transactions are not within the scope of Section 16(b) because the acquisition of the warrants was an incidental part of acquisitions of the three companies. Without deciding whether this amounted to a "purchase" of securities for purposes of Section 16(b), the court held (340 F. Supp. 2d at 411):

> 'In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to inside information.' *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594 [ ] (1973). We can conceive of situations where an insider could acquire one company simply (or mainly) to obtain its interests in the subject company, as when the acquired company has few other assets or exists for the sole purpose of trading in shares of the subject company. However, plaintiff has failed to plead any facts giving rise to such a possibility here.

The district court was correct to find that this sort of indirect acquisition in a change-in-control transaction typically does not fall within the scope of Section 16(b). The

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[5] There are no allegations against Cox in Count II.

district court, however, incorrectly resolved the issue by use of *Kern*. The *Kern* Court held that a transaction that literally falls within the scope of Section 16(b) may, nevertheless, be excluded from the section if, on the facts of the case, it does not present a risk of speculative abuse. While the defendant in *Kern* was a greater than 10% owner of stock in the issuer, it also was an unsuccessful hostile tender offeror. To the Court, the critical factors in excluding the defendant from liability under Section 16(b) were that the defendant was forced to sell pursuant to a merger agreement, whose terms it did not negotiate, and, as a hostile tender offeror, the defendant did not have access to inside information. *See Kern*, 411 U.S. at 597-98. This Court has read *Kern* to require that the insider not have access to inside information and/or have no control over the terms of the transaction or its occurrence. *See American Standard, Inc. v. Crane Co.*, 510 F.2d 1043, 1054 (2d Cir. 1974). Here, defendant Comcast does not meet either of those criteria, and we believe *Kern* does not apply.

This case calls for a different approach. The acquisition of At Home warrants here was an indirect consequence of a change-in-control transaction. In general (although there can be exceptions, as we discuss below), this sort of indirect and incidental acquisition should be presumed not to be a "purchase" for purposes of Section 16(b), since it is not the sort of transaction Congress was concerned about. The Supreme Court has stated that "'the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great.'" *Kern*, 411 U.S. at 592 (*quoting Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. 418, 422 (1972)). As the Commission explained long ago, a six-month period was chosen because that "arbitrary period" was thought "as roughly marking the distinction between short swing speculation and long term investment." *Notice of Proposal to Adopt a Rule Exempting from the Operation of Section 16(b)*

Certain Acquisitions and Dispositions of Securities Pursuant to Mergers or Consolidations, Exchange Act Rel. No. 4696, 17 Fed. Reg. 3177, 1952 SEC LEXIS 63 (April 9, 1952).

Because Section 16(b) can be harsh in imposing strict liability, "Congress itself limited carefully the liability imposed by §16(b)." *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232, 252 (1976).[6] "When Congress has so recognized the need to limit carefully the 'arbitrary and sweeping coverage' of §16(b) * * * courts should not be quick to determine that * * * Congress intended the section to cover a particular transaction." *Id.* at 252 (citations omitted). *See also Gollust v. Mendell*, 501 U.S. 115, 122 (1991); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934).

An insider who seeks to profit from inside information typically will engage in a purchase or sale in the issuer's securities, and then engage in an opposite-way transaction when the information becomes public, and the securities' price is affected. A change in control, however, is typically motivated by a desire to acquire control of a company. It also involves complex negotiations, and many strategic corporate considerations, and often involves regulatory review and approval. While it is not beyond possibility that an acquiror would tailor a change in control transaction to obtain short-swing profits from insider trading, it is certainly not going to be a common scenario. Good faith change in control transactions are not ones "in which the possibility of abuse [is] intolerably great," *Kern*, 411 U.S. at 592.

The plaintiff nonetheless argues that these acquisitions literally meet the words of the definition of "purchase" in Section 3(a)(13) of the Exchange Act. However, the prefatory language to the Exchange Act definitions states that they apply "[w]hen used in this title, unless the *context otherwise*

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[6] *See also Gollust v. Mendell*, 501 U.S. 115, 122 (1991); *Reliance Electric Co. v. Emerson Electric Co.*, 404 U.S. at 422-25.

requires." Section 3(a), 15 U.S.C. 78c(a) (emphasis added). This Court has "recognized the importance of this introductory phrase in certain situations." *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 559 (2d. Cir. 1985). For example, Section 3(a)(10) of the Exchange Act, 15 U.S.C. 78c(a)(10), excludes from the definition of "security" "any note * * * which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited." In spite of this language, which would seem to exempt all notes of any quality, so long as of proper duration, this Court has long held, citing the context clause, that the exemption does not apply "literally," but only applies to notes that are the equivalent of commercial paper. *See, e.g., SEC v. American Board of Trade, Inc.*, 751 F.2d 529, 538 (2d Cir. 1984) (Friendly, J.).

Employment of the context clause is likewise appropriate here. As discussed above, Section 16(b) is a strict liability statute. The purpose of the provision must be taken into account when construing the Section 3(a) definitions of "purchase" and "sale" with respect to Section 16(b). Since a change in control transaction will rarely be used to engage in insider trading in securities held as an asset by the acquired company, this sort of indirect acquisition should presumptively be deemed not to be a purchase for purposes of Section 16(b) (or a sale by the prior owners of the company). We say "presumptively" because, as the district court noted, there may be circumstances where an insider uses the acquisition of another entity as a subterfuge in order to acquire underlying securities. The plaintiff, however, should bear the burden of pleading and proving that this indirect acquisition was such an exception, something the plaintiff has not done here.[7]

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[7] This does not mean, as might be thought, that Section 16(b) would cease to be a strict liability statute. It is a strict liability statute with respect to short-term transactions that are properly deemed purchases and sales

IV. THE "UNORTHODOX TRANSACTION DOCTRINE" IS INAPPLICABLE TO THE TRANSACTIONS IN THIS CASE.

This Court next asks "[w]hether the *Kern* 'unorthodox transaction' doctrine supports the District Court's dismissal of either of the relevant claims." As discussed in the prior section, we do not believe that the doctrine should be expanded to apply, as the district court did, to the claim based on indirect acquisition of At Home warrants in three change of control transactions.

Separately, Cox argues that dismissal of plaintiff's *first* cause of action should be affirmed because "[a]s in *Kern County*, AT&T 'undoubtedly knew more about' At Home than Cox at the time of the alleged 'purchase' and 'sale'" (Brief of Appellee Cox pp. 54-55, *citing Kern County*, 411 U.S. at 602). While this might be true, it is not a basis for applying *Kern*, which this Court has read to require lack of access to inside information and/or a forced transaction, neither of which existed here.

V. CONTROLLING DEFERENCE IS OWED BY THE COURT TO THE COMMISSION'S REASONABLE INTERPRETATIONS OF SECTION 16(b) AND RELATED COMMISSION RULES.

The Court asks "[w]hat deference, if any, this Court owes the positions the SEC adopts in its *amicus curiae* brief." This actually presents two questions: (1) what deference is owed to the Commission's construction of its own rules in an *amicus* brief; and (2) what deference is owed to the Commission's construction of the federal securities statutes provided in an *amicus* brief.

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for purposes of the statute. The inquiry here is whether a purchase was involved.

A. This Court and the Supreme Court Have Repeatedly Held that a Court Is Bound by an Agency's Reasonable Interpretations of Its Own Regulations Provided in an *Amicus* Brief.

The deference accorded by the courts to the Commission's interpretations of its own rules in an *amicus* brief is settled law. This Court has repeatedly held that it is "'bound by the SEC's interpretations of its regulations in its *amicus* brief, unless they are 'plainly erroneous or inconsistent with the regulation[s].'" *DeMaria v. Andersen*, 318 F.3d 170, 175 (2d Cir. 2003) and *Levy v Southbrook International Investments, Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001) (*both cases quoting Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 128 (2d Cir. 2000)). *Accord Yourman v. Giuliani*, 229 F.3d 124, 128 (2d Cir. 2000) (deferring to an interpretation of regulations submitted in an *amicus* brief by the Secretary of Labor). In *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), the Supreme Court first established the principle that an agency's interpretation of one of its own regulations commands substantial judicial deference such that the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."

More recently, the principle was reinforced in *Auer v. Robbins*, 519 U.S. 452 (1997), where petitioner complained that an agency's interpretation of a regulation came in the form of an *amicus* brief. The Supreme Court declared, "[t]hat does not, in the circumstances of this case, make it any less worthy of deference" because the agency's "position is in no sense a '*post hoc* rationalizatio[n]' advanced by [the] agency seeking to defend past agency action against attack" 519 U.S. at 462 (*quoting Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)). "There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id. See also*

Barnhart v. Walton, 535 U.S. 212, 217 (2002) (reaffirming *Auer*). As this Court has explained:

> [W]e recognized that an agency's interpretation of its own regulations is entitled to considerable deference, irrespective of the formality of the procedures used in formulating the interpretations. *See Taylor v. Vt. Dep. of Educ.*, 313 F.3d 768, 779-80 (2d Cir. 2002) (*citing Auer v. Robbins* [,*supra*, at 461]); *LaFleur v. Whitman*, 300 F.3d 256, 277 (2d Cir. 2002)). We defer to an agency's interpretation of its own regulations because we 'presume that the power authoritatively to interpret [the agency's] own regulations is a component of the agency's delegated lawmaking powers.' *Martin v. Occupational Safety & Health Rev. Com'n.*, 499 U.S. 144, 151 [] (1991).

Ecarnacion v. Barnhart, 331 F.3d 78, 86 (2d Cir. 2003).[8] In light of the well established law in the Supreme Court and this Court, the Commission's interpretations of its rules expressed in this brief are binding, unless they are plainly erroneous or inconsistent with the regulations.

B. This Court Should Accord *Chevron* Deference to Interpretations of the Federal Securities Statutes Provided in Commission *Amicus* Briefs.

The Court also owes controlling deference to the Commission's interpretation of the statute—Section 16(b)—provided in this *amicus* brief. The analysis of this question

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[8] There are three preconditions for applying *Bowles or Auer* deference: the language of the regulation in question must be ambiguous; there must be no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question; and the agency's reading of its regulation must be fairly supported by the text of the regulation itself. *Drake v. FAA*, 291 F.3d 59, 68 (D.C. Cir. 2002) (citations omitted).

begins with *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the Supreme Court has recently summarized:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. 467 U.S., at 865-866, 81 L. Ed. 2d 694, 104 S. Ct. 2778. If a statute is ambiguous, and if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation. *Id.* at 843-844, and n. 11, 104 S. Ct. 2778.

National Cable & Telecommunications Assoc., v. Brand X Internet Services, __ U.S. __, 125 S.Ct. 2688, 2699 (2005).[9]

For an agency interpretation to receive *Chevron* deference, the agency must have been entrusted by Congress with authority to interpret the statute, the statute must be ambiguous and subject to interpretation, and the agency's interpretation must be a reasonable one. The term "purchase" as applied to Section 16(b) is ambiguous. Congress has entrusted the Commission with responsibility for resolving ambiguities in light of the purpose of the statute. Section 16(b) provides that "[t]his subsection shall not be construed

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[9] Prior to *Chevron*, the Court held in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), that the "rulings, interpretations and opinions of" an agency that do not constitute an exercise of lawmaking authority, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment" which are "entitled to respect" to the extent they are persuasive. *Id.* at 140.

to cover * * * any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." As this shows, Congress did not believe Section 16(b) was self-explanatory and vested the Commission with authority to identify the purpose of the statute and identify transactions which do not contravene the section's purpose.[10]

The Commission has generally done that through rulemaking. However, rulemaking is not a prerequisite for the Commission's views to be accorded *Chevron* deference. While earlier cases focused on the formality of an agency decision, such as whether it was the product of notice and comment rulemaking or of an adjudication, *see Christensen v. Harris County*, 529 U.S. 576, 587 (2000), more recent cases have focused on whether the interpretation is the product of authoritative agency consideration. In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court addressed the level of deference to be accorded to Customs Service tariff classifications contained in "letter rulings." The court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise

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[10] In two recent cases, this Court declined to give *Chevron* deference to Commission *amicus* briefs because the statutes at issue did not explicitly look to the Commission to fill in interstices in the statutes. *See Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34 n.6 (2d Cir.), *cert. granted.*, 126 S. Ct. 34 (2005) (Mem.) (construing provision of Securities Litigation Uniform Standards Act preempting state law securities fraud actions); *In re Enterprise Mortgage Acceptance Co., LLC, Securities Litigation*, 391 F.3d 401, 410 n.8 (2d Cir. 2005) (construing provision in Sarbanes-Oxley Act modifying statutes of limitation in private securities lawsuits). Whatever the merit of those decisions as to those statutes, this case involves a statute, Section 16(b), in which Congress expressly delegated to the Commission that responsibility.

of that authority." *Id.* at 226-27. While the Court noted that "the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of noticeand-comment rulemaking or formal adjudication," the Court added:

> That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.

Id. at 230-31. The Court held that "[t]he fact that the tariff classification here was not a product of such formal process does not alone, therefore, bar the application of *Chevron*," *Id.* at 231. The opinion, however, gives little conclusive guidance as to what must be shown, since the Court held that the authorities cited to it—letter rulings issued by 46 different scattered Customs offices—were obviously not authoritative agency positions. *See id.* 233.

The next year, however, in *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court achieved some clarity by stating flatly that an agency interpretation may be entitled to *Chevron* deference even when it is neither the product of notice-and-comment rulemaking nor has the force of law. The major factor the Court looked to is the level of *careful consideration an agency has given the question. See* 535 U.S. at 222. In *Barnhart* the petitioner, whose application for benefits was denied by the Social Security Administration, asked the Court to disregard the agency's interpretation found in recently promulgated regulations. The Court noted that the interpretation in fact was a "long standing" one and "the fact the Agency previously reached its interpretation through means less formal than 'notice and comment' rulemaking * * * does not automatically deprive that interpretation of the judicial deference otherwise due" under *Chevron*. 535 U.S. at 221

(citations omitted). Then, turning its attention to the confusion caused by *Christensen* and *Mead*, the Court stated:

> If this Court's opinion in Christensen * * * suggested an absolute rule to the contrary, our later opinion in *United States v. Mead* * * * denied the suggestion. * * * Indeed, *Mead* pointed to instances in which the Court has applied *Chevron* deference to agency interpretations that did not emerge out of notice-and-comment rulemaking. * * * It indicated that whether a court should give such deference depends in significant part upon the interpretative method used and the nature of the question at issue.

535 U.S. at 221-222 (citations omitted).[11] The Court went on to conclude (*id.* at 222):

> In this case the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue. * * *

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[11] As this makes clear, not every informal statement of agency position is to be accorded *Chevron* deference. The Supreme Court has since declined to accord such deference to internal agency guidance, such as that "presented in internal guidance memoranda," *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 487 (2004), and an internal operating manual, *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003). We believe that the public position articulated here by the Commission itself, with the deliberative process undertaken to reach its position and the explanation of the reasons for that position, is more akin to the sort of articulations contained in rulemaking than it is to internal guidelines.

Later that year, this Court construed Barnhart to mean:

> Less formal interpretations may also be entitled to mandatory deference, depending upon to what extent the underlying statute suffers from exposed gaps in its policies, especially if the statute itself is very complex, as well as on the agency's expertise in making such policy decisions, the importance of the agency's decisions to the administration of the statute, and the degree of consideration the agency has given the relevant issues over time. *See Barnhart v. Walton*, 535 U.S. 212, 122 S. Ct. 1265, 1272, 152 L. Ed. 2d 330 (2002).

Community Health Center v. Wilson-Coker, 311 F.3d 132, 138 (2d Cir. 2002).[12]

The only statutory interpretation in this brief is whether Section 16(b) applies to a transaction where an insider acquires securities of an issuer indirectly by acquiring ownership of a third party company which, in turn, owns securities of the issuer. This is precisely the sort of question that Congress directed the Commission to deal with. Section 16(b) states that it will not apply to transactions which the Commission exempts as not within the purpose of the statute. Because the statute imposes strict liability, the Commission's role in determining when to exempt transactions is of critical importance to application of the statute. Congress and the Supreme Court have been clear that this is a statute which the Commission should assure is not unduly broad. This is, in short, precisely the sort of interstitial issue where *Chevron* deference is due the Commission's informal conclusions; "the

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[12] In *Dabit* and *Enterprise Mortgage*, this Court later cited *Mead* for the proposition that Commission views expressed in an *amicus* brief, rather than a rule or regulation, cannot receive *Chevron* deference. That position appears contrary to the Supreme Court's decision in *Barnhart* and this Court's decision in *Community Health Center*.

statute itself is very complex", the Commission has long and broad "expertise in making such policy decisions," and "the importance of the agency's decisions to the administration of the statute" is critical.

The only reason to consider not according conclusive deference to the Commission's position might be that it is not a "long-standing" one. That, however, is only true in the limited sense that the claim that the indirect acquisitions are within the scope of Section 16(b) is itself an apparently novel claim. The Commission should not have to envision every novel claim that might be made under Section 16(b) and analyze these hypothetical claims, before its views will be deemed authoritative.[13]

In a broader sense, moreover, the analysis here is closely similar to the sort of analysis the Commission has repeatedly engaged in for many years. The Commission has over the decades analyzed which transactions do not present risk within the purposes of Section 16(b).[14] Consistent with its rulemaking authority, the Commission has emphasized in both rules and *amicus* briefs that liability should exist only in situations where there is a real risk of insider trading.[15]

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[13] In *In re New Times Securities Services, Inc.*, 371 F.3d 68, 80-83 (2d Cir. 2004), this Court appeared to recognize that a Commission *amicus* brief might be entitled to Chevron deference, but declined to give it such deference because of the Commission's failure to previously address an issue even though it was longstanding. The Court also noted the presence of a competing view by an entity that administers the provision on a day to day basis, and the relation of the Commission to that entity. None of those facts exist in this case.

[14] *See, e.g., Rules* 16a-9 through 13 and 16b-1 through 16b-8, 17 C.F.R. 240.16a-9 to 16a-13 and 16b-1 to 16b-8.

[15] *See, e.g., Ownership Reports and Trading By Officers, Directors and Principal Securities Holders*, Exchange Act Rel. No. 28869, 56 Fed. Reg. 7242, 7252 (Feb. 21, 1991); *Brief of the Securities and Exchange Commission, Amicus Curiae, in Support of the Appellee on Issues Addressed*, at 23-24; *Levy v. Southbrook International Investments, Ltd*, 263 F.3d 10

The Commission's *amicus* position here satisfies the other requirements for *Chevron* deference. It is the product of careful consideration, and is the authoritative view of the Commission itself, not merely staff views. The Commission's Office of the General Counsel posted to the Commission's Web site a statement regarding consideration of *amicus* briefs. In relevant part, it states that after a request is made:

> The Office of the General Counsel will review the materials submitted and seek input from Divisions and Offices of the Commission that may have an interest in the case. In cases where further review is appropriate, the staff generally will contact both sides and offer them the opportunity to make further submissions in writing, in person, or by telephone. If the staff determines that *amicus* participation is merited in a particular case, the Office of the General Counsel will make a recommendation, together with interested Divisions and Offices, to the Commission. The Commission then considers and votes on whether to accept the recommendation and file a brief. This process can take a significant amount of time.

Request for Commission Amicus Participation in a Pending Case, posted at http://www.sec.gov/litigation/briefs/amicus request.htm. *Amicus* briefs submitted by the Commission thus represent the views of the Commission. *See e.g.*, David S. Ruder, *Address: The Development of Legal Doctrine Through Amicus Participation: The SEC Experience*, 1989 Wis. L. Rev. 1167 (1989). All of these steps were taken in this case.[16]

(2d Cir. 2001); *Brief of the Securities and Exchange Commission, Amicus Curiae* at 13-14, *Gryl v. Shire Pharmaceuticals Group PLC.*, 298 F.3d 136 (2d Cir. 2002).

[16] The Commission's staff had detailed meetings with both sides' counsel, made further inquiries of them and received responses, and prepared a detailed written analysis and recommendation. The Commission reviewed

Even when denying deference to a Commission *amicus* brief on other grounds, this Court has said it had "no reason to doubt that the SEC's interpretation was the product of careful consideration." *In re New Times Securities Services, Inc.*, 371 F.3d at 82.

The statutory interpretation in this brief is an authoritative and fully considered position by the Commission, which reasonably construes an ambiguous statutory provision whose interpretation was explicitly entrusted by Congress to the Commission. We believe that the views expressed in this brief are entitled to Chevron deference.

CONCLUSION

The judgment of the district court should be affirmed and the positions of the Commission urged above should be adopted by the Court.

Respectfully submitted,

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February, 2006

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the recommendation for three weeks, met and discussed it, and then voted to authorize the brief. It also reviewed the brief itself.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 05-0115-cv

AT HOME CORPORATION,
Plaintiff-Appellant,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,
Defendants-Appellees.

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

I certify that THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT complies with the type-volume requirements of Rules 32(a)(7)(B) and 29(d) of the Federal Rules of Appellate Procedure (F.R.A.P.) because it contains 6988 words. I further certify that this brief complies with the typeface requirements of F.R.A.P. 32(a)(5) and the type style requirements of F.R.A.P. 32(a)(6) because it has been prepared in proportionally-spaced typeface using WordPerfect (version 11) in garamond 14-point font size.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 32(a)(1): BRIEFS IN DIGITAL FORMAT

I certify that THE BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT, as submitted in digital format, has been scanned for viruses using McAfee VirusScan version 8.0 with signature 4692 of February 8, 2006 and that no viruses have been detected as required by Local Rule 32(a)(1).

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Defendants-Appellees.

CERTIFICATE OF SERVICE

I, Allan A. Capute, am a member of the bars of Maryland and the District of Columbia, and I hereby certify that on 9th day of February, 2006, I caused to be served two copies of the BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, *AMICUS CURIAE*, SUBMITTED AT THE REQUEST OF THE COURT, to counsel for the parties of record at the address below, by overnight Federal Express:

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APPENDIX B

SEC Rule 16b-6(b) (17 C.F.R. § 240.16b–6(b))

The closing of a derivative security position as a result of its exercise or conversion shall be exempt from the operation of section 16(b) of the Act, and the acquisition of underlying securities at a fixed exercise price due to the exercise or conversion of a call equivalent position or the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act: *Provided, however*, That the acquisition of underlying securities from the exercise of an out-of-the-money option, warrant, or right shall not be exempt unless the exercise is necessary to comport with the sequential exercise provisions of the Internal Revenue Code (26 U.S.C. 422A).

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No. 06-147

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THE PETITION PRESENTS IMPORTANT QUESTIONS UNDER THE FEDERAL SECURITIES LAWS THAT SHOULD BE RESOLVED 3

A. Count I 3

B. Count II 6

CONCLUSION 7

TABLE OF AUTHORITIES

CASES Page

Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).....6
Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995).....5
Reves v. Ernst & Young, 494 U.S. 56 (1990).....6
SEC v. W.J. Howey Co., 328 U.S. 293 (1946).....6
Yee v. Escondido, 503 U.S. 519 (1992).....5

STATUTES

15 U.S.C. § 78p(b).....3
15 U.S.C. § 78c(a)(13).....6

OTHER AUTHORITIES

Commission Amicus/Friend of the Court Briefs, http://www.sec.gov/litigation/briefs/amicusrequest.htm.....2
Appellants Letter Brief in Response to the SEC Amicus Brief dated 3/3/06, *At Home v. Cox Commc'ns, Inc.*, 446 F.3d 403 (2d Cir. 2006) (No. 05-0115-cv).....5
Peter J. Romeo & Alan L. Dye, *Section 16 Updates*, Vol. XVI, No. 1 (March 2006).....2, 3
Peter J. Romeo & Alan L. Dye, *Section 16 Updates*, Vol. XVI, No. 2 (June 2006).....3
Request for Commission Amicus Participation in a Pending Case, http://www.sec.gov/litigation/briefs/amicusrequest.htm.....2

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INTRODUCTION

The Court should grant the petition to resolve important unsettled questions of federal securities law involving the continued vitality and application of § 16(b) of the Securities Exchange Act of 1934, the "short swing" insider trading statute, to the largest insider trading profit -- over $600 million -- ever realized by corporate insiders, and to close a

dramatically expandable loophole created by the Second Circuit's decision. The Court should also grant the petition to clarify the statutory definition of a basic but critical term in the federal securities laws -- "purchase" -- which has broad applicability throughout federal securities regulation.

Respondents, two of the largest cable companies in America, argue at great length that the issues here are unimportant and unworthy of this Court's attention. Unwittingly, Respondents' arguments do much to underscore the importance of resolving the issues presented here. Respondents spend pages discussing the amicus brief submitted by the United States Securities and Exchange Commission ("SEC") to the Second Circuit, yet they omit the undeniable fact that the SEC submitted an amicus brief to the Second Circuit precisely because this case raises "issues of significance to the administration of the federal securities laws." *See* Commission Amicus/Friend of the Court Briefs, http://www.sec.gov/litigation/briefs/amicusrequest.htm. Indeed, the SEC's amicus brief submitted below at the invitation of the Second Circuit was one of the three filed for the entire year to date that the SEC has chosen to highlight on its website. *See* Request for Commission Amicus Participation in a Pending Case, http://www.sec.gov/litigation/amicus briefs.shtml.

While Respondents also assert that the issues presented are settled, that is not the position Respondents' counsel has taken in a leading § 16 trade publication that they publish. In that publication, the issues presented by this action are described as follows:

> Hybrid derivative instruments provide the holder with the right to exercise the instrument at a fixed or floating price, whichever is most advantageous to the holder. Because these instruments contain an element found in derivative securities (i.e., a fixed price), as well as an element found in non-derivative securities (i.e., a floating price), *courts*

> *have struggled with their treatment under Section 16(b). The uncertainties and conflicting decisions regarding these instruments*, which are discussed in Section 3.03[5][f][iii] (at pages 246-48) of our *Section 16 Treatise and Reporting Guide*, *apparently led the Second Circuit to seek the SEC's guidance* with respect to five specific issues relating to controversy in this case.

Peter J. Romeo & Alan L. Dye, *Section 16 Updates*, Vol XVI, No. 1 at 11 (March 2006) (emphasis added). A later issue of the same trade publication confirms that this case involves the "largest [claim] in the history of Section 16(b)," and further asserts that while "the treatment of hybrid securities is now settled in the Second Circuit, it remains an open issue in the Third Circuit due to a contrary decision issued by a district court in 2000 in *Levy v. Clearwater Fund IV, Ltd.*" Peter J. Romeo & Alan L. Dye, *Section 16 Updates*, Vol. XVI. No. 2 at 7, 9 (June 2006).

The Court should grant the petition to address for the first time in 15 years a statute passed over 70 years ago as part of the sweeping reform of the securities markets and in a direct effort to prevent exactly what occurred here: insiders reaping enormous and outsized gains from selling and buying securities of a corporation within a six-month period. *See* 15 U.S.C. § 78p(b).

ARGUMENT

I. THE PETITION PRESENTS IMPORTANT QUESTIONS UNDER THE FEDERAL SECURITIES LAWS THAT SHOULD BE RESOLVED

A. Count I

Respondents make no attempt to refute, nor could they, that this case arises out of insiders admittedly reaping the largest ever profit from buying and selling the securities of a

single company in United States history. We are aware of none bigger that has been challenged under § 16(b).

As described in more detail in the petition, as part and parcel of a change of control transaction, Cox and Comcast entered into a "put" agreement to sell all or some of their At Home common stock to another At Home insider, AT&T, at $48 per share or at a higher price. The Complaint alleges in Count I that the "put" became a "derivative security" and hence became a "sale" for purposes of § 16(b) when Cox and Comcast triggered the exercise of the put which, based on market prices for At Home stock at the time, set the number of shares to be sold and the price per share for the first time. Cox and Comcast were subsequently paid billions of dollars to cancel the put -- a "purchase" -- and they admittedly obtained over $600 million in profits from this cancellation.

Far from presenting unimportant questions that could be resolved easily from the face of the statute or from SEC rules, the first cause of action in the Complaint centered around the unresolved question of when the § 16(b) six-month clock starts to tick for derivative instruments such as the put at issue. The instrument created by Respondents in an attempt to evade § 16(b) liability leaves open the critical terms of any securities transaction -- the exact number of shares to be sold and the price per share -- until after a notice of exercise is sent. By waiting to "purchase" the securities until six months had passed from the creation of this instrument, Respondents contended and the Second Circuit agreed that they had escaped all liability under § 16(b). The importance of this issue is not in any way diminished by the Complaint's allegations that the put at issue here had certain unique characteristics. The instrument is easily replicated. If the Second Circuit principles are upheld, there is little doubt that the loophole

created will invite copycat instruments also designed to evade § 16(b) liability.[1]

The Second Circuit erred in not adopting the approach advocated by Petitioner: that a sale for § 16(b) purposes occurred both when the put was created and later when Cox and Comcast gave notice of their intent to sell shares under the put, thus setting the price and number of shares to be sold for the first time. This analysis is consistent with the wording of the statute and consonant with its purpose. Because Respondents cannot meet this argument on the merits, Respondents spend page after page contending that this argument is improperly raised here for the first time. In fact, Petitioner developed and advanced the above approach in the Court below.[2] Regardless, this Court has explicitly stated that "[the] traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *see also Lebron*, 513 U.S. at 379 ("[Petitioner's] contention that Amtrak is part of the Government is in our view not a new claim within the meaning of that rule, but a new argument to support what has been his consistent claim").

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[1] Respondents' contention that the issues presented under § 16(b) do not involve a conflict among Circuit Courts is not supported. Indeed, as noted above, Respondents' counsel concedes in their § 16 publication that the Circuit Courts remain unsettled on the treatment of so-called "hybrid" derivative securities under § 16(b). Moreover, historically, the decided majority of § 16(b) litigation finds a home in the courts of the Second Circuit. To avoid review of § 16(b) decisions because of a lack of conflict among circuits is essentially to conclude that this Court will be unwilling to hear important issues under § 16(b).

[2] *See* Appellants Letter Brief in Response to the SEC Amicus Brief dated 3/3/06 at 4, *At Home v. Cox Commc'ns, Inc.*, 446 F.3d 403 (2d Cir. 2006) (No. 05-0115-cv).

The Court should grant the petition to remove the uncertainty surrounding the application of § 16(b) to derivative instruments created by the Second Circuit's decision.

B. Count II

The SEC's amicus brief also addressed the significant issue under Count II of whether the definition of the term "purchase" in § 3(a)(13) of the Exchange Act, which includes "any contract to buy, purchase or *otherwise acquire*" a security, should be accorded its plain meaning. 15 U.S.C. § 78c(a)(13) (emphasis added). The Second Circuit refused to give the definition its plain meaning and instead held that where a company "acquires" stock of an issuer held by another company which it purchases, that acquisition is somehow excluded from the ambit of the definition because the transaction was not likely motivated by a desire to acquire the securities.

Recognizing that granting a petition to resolve and clarify the definition of the term "purchase" under the securities laws is the paradigmatic case taken by this Court for review,[3] Comcast attempts to muddy the issue presented by asserting, contrary to the plain language of the Second Circuit's opinion, that "the Second Circuit's dismissal of [Count II] was based upon a strict, plain-language reading of the term 'issuer' in Section 16(b)" -- not the definition of the term "purchase." Comcast Br. at 22. This is revisionist history. It

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[3] The Supreme Court has often taken up cases in order to clarify the meaning of definitions within the federal securities laws. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 (1985) (holding that when an instrument falls plainly within the statutory definition of a security, "[t]here is no need . . . to look beyond the characteristics of the instrument to determine whether the Acts apply"; *Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) (providing test to define "any note"); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (providing test to define "investment contract").

ignores the holding by the Second Circuit expressly rejecting Petitioner's lead argument below that Comcast's acquisitions of other cable companies which, in turn, also owned At Home securities were § 16(b) "purchases" of At Home securities. See Pet. App. at 13a. The Second Circuit's decision to "reject At Home's effort to treat Comcast's cable system acquisitions as section 16(b) purchases" squarely presents the Court with the opportunity to address the meaning of "purchase" under the securities laws. *Id.*

Comcast cannot dispute that the Second Circuit's failure to give plain meaning to the phrase "otherwise acquire" in the definition of "purchase" has far reaching consequences for § 16(b). The departure by the Second Circuit from the "plain meaning" approach mandated by this Court and adopted by other Circuits in interpreting the definitional terms in the securities laws should be corrected. In addition, based on the Second Circuit's ruling, companies will now drop securities holdings into separate corporate entities and buy and sell those entities, thus enabling them to "dispose of" and "acquire" stock without triggering liability under § 16(b). There is no statutory basis for this loophole. It should be closed.

CONCLUSION

The Court should grant the petition.

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